Woodroffe & Ameer Ali's

Law of Evidence

FOURTEENTH EDITION
(In Four Volumes)

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VOL. IV
[*Sections* 115-*End*]

1981

Reprinted 1983

Law Book Company
SARDAR PATEL MARG—POST BOX No. 4
ALLAHABAD—211001

An estoppel is only a matter of proof.[10] The onus of proving an estoppel lies of course on him who sets it up.[11] The representation, which is the basis for the rule must be clear and unambiguous and not indefinite.[12]

Once in a particular case, the authorised officer of the Railways makes the representation that a consignment has not arrived and on the basis of such representation the consignee acts, the plea of estoppel would be available to the consignee against the Railway Administration.[13] An estoppel cannot be created either by an ambiguous document or an ambiguous act.[14] It is not necessary that there should be any fraudulent intention established in connection with the misrepresentation which is the subject of estoppel.[15] A man is estopped when he has said, done or permitted something or act, which the law will not allow him to gainsay.

3. No odium attached to doctrine of estoppel. Owing to its use in ancient times, in shutting out the truth against reason and sound policy, the doctrine of estoppel was not favoured and was characterised as "odious". In modern times the doctrine has lost all ground of odium and become one of the most important, useful and just factors of the law. At the present day it is employed not to exclude the truth; its whole force being directed to preclude parties, and those in privity with them, from unsettling what has been fittingly determined—a just principle which can be and is daily administered to the well-being of society.[16] As their Lordships of the Privy Council observed in a case: "There was perhaps a time when estoppels were described as odius and as such were viewed with suspicion and reluctance. But in more modern times, the law of estoppel has developed and has become recognised as a beneficial branch of law. That great lawyer Sir Frederick Pollock has described the doctrine of estoppel as 'a simple and wholly untechnical conception, perhaps the most powerful and flexible instrument to be found in any system of court jurisprudence'. A question now of estoppel must be decided on ordinary common law principles of construction and of what is reasonable, without fine distinctions or technicalities."[17] In the case of one estoppel against another, the parties are set free and the Court has to see what their original rights are.[18]

4. Elements of estoppel. Generally, the elements of estoppel are:

(1) A representation in any form, a declaration, act or omission.

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10. Bashi Chandra v. Enayat Ali, (1892) 20 C. 236, 239.

11. Birendra Kishore v. Baikunta Chandra. 1919 Cal. 1032 : 46 I.C. 474 and the ordinary rules of proof apply. Therefore if an estoppel arising out of a written statement is produced, it and not the judgment, must be put in evidence, Ananda Prasanna v. Badulla. 1919 Cal. 963: 47 I.C. 985; an ectoppel can only be raised by pleading. If it is not pleaded the Court will not go into the matter; Purgan Pande v. Dhanpat Tewari, 1919 Pat. 309 : 52 I.C. 739.

12. Bennett Coleman & Co. (Pvt.), Ltd. v. Punya Priya Das Gupta. (1970) 1 S.C.R. 181 : (1970) 1 S.C.A. 123 : 1970 1 S.C.J. 401 : 37 F.J.R. 498 : 19 Fac. L.R. 32 : (1969) 2 Lab. L.J. 554 : A.I.R. 1970 S.C. 426 (434).

13. Union of India v. Rasul Ahmad, A.I.R. 1970 Orissa 157 (161).

14. Mamsa v. Salliajjee, A.I.R. 1918 Lower Burma 53 : 46 I.C. 609.

15. Balbir Prasad v. Jugal Kishore. 1918 Pat. 646 (2) : 46 I.C. 473.

16. Bigelow, op. cit., 6th Ed., 5° 6.

17. Canada and Dominion Sugar Co., Ltd. v. Canadian National (West Indies) Steamship, Ltd., 1947 P.C. 40 at 43.

18. Jiwan Lal v. Behari Lal. 1918 Lah. 392 : 45 I.C. 68.

from this that theft appears to have been committed if a person appropriate to his own profit the use of another's thing. One should not be disturbed by the seeming fact that he does nothing for personal profit; it is a form of gain to make large with another's property and thereby to acquire a debtor who is under obligation to one. Thus, a person is liable for theft who removes a thing to give it to a third party. 2. The *Law of the Twelve Tables* allowed a man, caught by day in the act of theft, to be killed only if he defended himself with a weapon. The term "weapon" comprises a sword, club, stone, and generally anything which could inflict harm. 3. Since the action for theft looks to the recovery of a penalty, while the *condictio* and *vindicatio* lie for the recovery of the thing, it is clear that though the thing be recovered, the action for theft remains intact while the other two remedies become otiose; conversely, though the penalty of fourfold or twofold may have been paid, the *vindicatio* and *condictio* remain intact. 4. One who knowingly lends implements for the breaking-in of a door or a cupboard or who, equally, lends a ladder for getting in will be liable to the action for theft, although there was no initial counsel on his part for the commission of the theft. 5. If a tutor who administers the estate, or a curator, make a *transactio* with the thief, the action for theft lies no more.

56 (55) ULPIAN, *Disputations, book 3:* When a creditor removes a thing pledged to him, he is not regarded as wrongfully appropriating the thing but as looking after his pledge.

57 (56) JULIAN, *Digest, book 22:* Sometimes, a thief becomes bound again in certain cases, while already liable to penalty, so that it is possible to proceed against him several times for theft of the thing. The first instance occurs where the ground of possession is changed, as when the thing has returned into its owner's control and the same thief steals it again, whether from the same owner or from the person to whom he has sold or lent it. But if the identity of the owner has changed, another liability is created. 1. One who takes a thief before the prefect of the watch or the provincial governor is deemed to have chosen the manner in which he wishes the issue to be dealt with. And if the matter is ended there, and the thief being condemned, the amount of the stolen money is recovered, the action for theft is removed; certainly so, if not only is the thief ordered to restore the stolen thing but the judge adjudicate something more against him. But even if he be ordered to do no more than return the stolen thing, by the very fact that the thief had been in danger of a greater punishment, the action for theft ceases to lie. 2. If a thing, part of a *peculium*, return into the control of the slave, the theftuous taint of it is purged, and it thereby becomes part of the *peculium* again and in the possession of his master. 3. When a slave abstracts with theftuous intent a thing which is part of his *peculium*, so long as he holds it, its legal state is unchanged (for the master loses nothing); but if he deliver it to someone else, he commits theft. 4. An administering tutor can make a *transactio* with the thief, and if he recovers the stolen thing into his control, it is no longer a stolen thing; for a tutor is in the position of an owner. The same must be said if the curator of a lunatic, who so far has the role of an owner that even by delivering a thing belonging to the lunatic, he is deemed to alienate it. A tutor and the curator of a lunatic can also bring a *condictio* for stolen goods in the name of the *pupillus* or lunatic. 5. If two of your slaves steal a garment and some silver, one action for theft lies against you for the garment, another for the silver; no defense to the second will be granted on the ground that proceedings have already been brought over the garment.

58 (57) ALFENUS, *Digest, Epitomized by Paul, book 4:* If someone dig a hole to remove lime and he does remove it, he is a thief, not for digging but for taking.

59 (58) JULIAN, *Urseius Ferox, book 4:* If theft be committed against a son-in-power, he may, on becoming a head of household, properly take proceedings in respect thereof. The same would apply, granted the same circumstances, where a hired thing had been stolen from him.

60 (59) JULIAN, *From Minicius, book 3:* If a person, having lent a thing, should stealthily take it away from the borrower, he cannot be sued for theft because he is taking back his own property and the borrower will be under no liability on the loan. At least, this is so if there be no circumstances which give the borrower a right to retain the thing; for if the borrower made necessary expenditure in respect of the thing, he would have a greater interest in keeping the thing in his hands than in bringing the action on loan, and in such a case, he would have the action for theft.

61 (60) AFRICANUS, *Questions, book 7:* Just as a runaway slave-woman is regarded as stealing herself, so she makes her child a stolen thing.

62 (61) AFRICANUS, *Questions, book 8:* If a slave owned in common should commit theft from one of his owners, the correct view is that proceedings should be by the action for dividing common property, and it will be for the judge's discretion to decide that his loss be made good by the other co-owner or that the latter give up his share. It can be seen to follow that likewise, if he should alienate his share, he can proceed for theft against the purchaser so that, in a way, the delictal action follows the person of the wrongdoer. This, says [Julian], is not to be carried to the length that we should say that proceedings could be taken against the slave personally if he should become free, any more than they could be if he had been the victim's exclusive property. It thus becomes obvious that if the slave be dead, there is nothing for which the victim can claim, unless perhaps his co-owner has derived some benefit from the thing stolen. 1. [Julian] follows up by saying that if, again, the slave whom you gave me in pledge should commit theft against me, I will recover by the counteraction on pledge, so that either you pay the damages or abandon the slave to me as having been noxally surrendered. 2. The same is to be said of one sued for rescission of a contract of sale, so that, just as the purchaser has to return any accessions to or fruits of the thing, so the vendor will be under obligation either to accept condemnation or to leave the slave with the purchaser as being noxally surrendered. 3. Further to all this, if a person knowingly give a thief to an unsuspecting creditor by way of pledge, in every way, he will have to make good any loss suffered by the pledgee; for this is in accord with the dictates of good faith. 4. In an action on purchase, it has particularly to be queried what sort of slave the vendor promised. 5. In the matter of a mandate, [Julian] says, there is room for doubt whether it should be equally said that all loss should be made good, but in fact, the principle should hold good even more than in the cases already discussed; so that, even if the person, who asked that a particular slave be purchased for him, did not know that the slave was a thief, he is nonetheless liable in full; for the person who accepted the mandate to purchase could, with every justification, say that he would not have incurred loss, if he had not accepted the mandate; the result is even more obvious in the case of deposit. For, although, other things being equal, it appears equitable that a person should not incur, through a slave, greater loss than the slave himself is worth, it is still more equitable that no one should be at a loss by reason of a transaction which he entered into for the benefit of the other party and not for his own. And just as in the contracts previously discussed—sale, hire, and pledge—it is to be said that the fraud of one who knowingly conceals the facts should be penalized, so in these cases, fault should be to the disadvantage of the person for whom the contract is made and not to that of the contracting party. And certainly, in the case of mandate, it is fault on the part of the mandator to request the purchase of such a slave, as also for a depositor not to be more circumspect in giving warning of the kind of slave that he is depositing. 6. In the matter of loan for use, a different view may properly

be taken, clearly, since only the benefit of the borrower is in issue. Hence, just as in letting and hiring, the lender will, if he be in any way dolose, not lose more than the value of the slave in which connection we should not be too punctilious in determining what is fraud because, as said, the lender derives no benefit from the transaction. 7. All this I think to be true, provided that the mandatory or depositee has not himself been remiss; if such a person should have entrusted the slave with the care of silver or coins, when, in no circumstances, would his master have done so, a different opinion must be adopted. 8. I let you some land and (as is customary) it was agreed that its produce would be in pledge to me in respect of the rent. If you were stealthily to remove the produce, [Julian] used to say that I can have the action for theft against you. Equally, if you sold the standing crop to someone who took it away, we say that it becomes a stolen thing. Crops, while in the soil, are part of the land so that a tenant makes them his own, because he is regarded as gathering them with the owner's consent. One certainly cannot say the same in the case just put; for by what reasoning can they be held to become the tenant's property when the purchaser reaps them for himself? 9. In a noxal action, an heir defended a *statuliber* who was to become free if he gave ten; while the action was pending, the man, having given ten to the heir, became free; the issue was raised whether absolution in the action could be effected only if the heir gave the ten to the plaintiff. [Julian] thought it relevant to know whence the money came; if it came from a source other than the *peculium*, the heir should make it over because, if the slave had not yet attained his liberty, he would have been noxally surrenderable to the plaintiff; but if it came from the *peculium*, the decision would be the converse because he would be giving the heir money which, in other circumstances, he would not allow to be given him.

63 (62) MARCIAN, *Rules, book 4:* A man does not become a thief by pointing out the way to a runaway slave.

64 (63) MACER, *Public Prosecutions, book 2:* The provincial governor cannot bring it about that a convicted thief does not incur *infamia.*

65 (64) NERATIUS, *Parchments, book 1:* A slave, by legacy charged on the heir, Titius, to Seius, committed a theft from Titius before the latter had accepted the inheritance. If, after such acceptance, Seius wishes the slave to be his property, Titius can bring the action for theft against him in respect of the slave because the slave did not belong to Titius at the time of the theft and (for all that one may think that if a slave becomes the property of the person from whom he stole, the action for theft so disappears that even if he again be alienated, it will not be possible to bring proceedings on the theft) he did not become the property of Titius, on his acceptance of the inheritance, because things bequeathed pass directly from the testator to the legatee.

66 (65) ULPIAN, *Curule Aediles' Edict, book 1:* One who appropriates another's thing with a view to his own gain is a thief, even if, changing his mind, he later returns it to the owner; no one ceases to be guilty by his own repentance over such a wrong.

67 (66) PAUL, *Plautius, book 7:* Even though he owns the thing, if a man sell the thing which he has given in pledge, he commits theft, whether he actually delivered the thing to his creditor or charged it by special pact; and so thinks Julian. 1. Suppose that a man from whom something was stolen bequeathed it to me while it was in the thief's hands; if the thief subsequently handle it again, do I have the action for theft? According to the opinion of Octavenus, the action for theft will lie to me alone; for the heir does not have the action on his own account, because, whatever the ground of change of ownership, it is certain that it is the current owner who can sue for theft. 2. The older jurists held that a man who, with wrongful intent, summoned a muleteer before the magistrate was guilty of theft, if the mules disappeared. 3. Julian ruled

that if a slave cashier asked for payments after being manumitted, he was guilty of theft. *Mutatis mutandis,* the same may be said of a tutor to whom payment is made after the *pupillus* has reached puberty. 4. If you commend Titius to me as a suitable person to whom to advance money and I make inquiries about Titius and then you bring forward someone else as being Titius, you commit theft because I believe him to be Titius, that is, if the person you present is aware of all the circumstances; if he is not aware, however, you do not commit theft, nor can the other person be said to be an accomplice, because no theft has been committed; but an *actio in factum* will be given against the person who presented him. 5. If I stipulate from you that "it shall not be through your fault that the slave Eros is not given to me by the first of such-and-such month," although I have an interest in his not being stolen (for if he be stolen, you will not be liable on the stipulation, provided that it is not your fault that he has not been handed over), nevertheless, I do not have the action for theft.

68 (67) CELSUS, *Digest, book 12:* No one commits theft by denying a deposit (for the denial in itself is not theft, though it is close to it); but if a person takes possession of the thing deposited with a view to appropriating it, he does commit theft. It is irrelevant whether he wears the ring on his finger or has it in a jewelbox, if, when he holds it as a deposit, he decides to hold it as his own. 1. If something be stolen from you which you had promised under penalty to deliver by a certain date with the result that you have to pay the penalty, that can be taken into the assessment in the action for theft. 2. A stolen slave-child grew up in the hands of the thief; the latter was thief of the adolescent no less than of the infant, and the theft is all one. Hence, the thief will be liable for twofold the highest value that it has ever had in his hands. Granted that he can be sued only once for the theft, what is the relevance of that for the question before us? If the slave were stolen from the thief and he recovered him from the second thief, then, even though he has committed two thefts, he can be sued only once. I have no doubt that it is the value of the adolescent not of the child that should be looked to. What could be more absurd than to think that the thief's position is improved by the continuance of his offense? 3. When the sale of a purchased slave goes off, the purchaser cannot proceed for theft against the vendor in respect of something which the slave stole from him after the sale but before he was returned. 4. A runaway slave stole a stolen thing from the thief; it is right that the thief should have the action for theft on that account against the slave's owner so that the offenses of such slaves shall not bring them immunity and be a source of profit to their owner; for often by such thefts, the *peculia* of these slaves are increased. 5. If, after the five years of his lease, an agricultural tenant takes further crops without the owner's consent, can he be sued for theft of the corn and vintage? I have no doubt that he is a thief, and if he consumes what he steals, the value of it can be recovered from him.

69 (68) MARCELLUS, *Digest, book 8:* Julian said that there can be no theft of a thing, part of a vacant inheritance, unless, say, the deceased had pledged it or given it on loan

70 (69) SCAEVOLA, *Questions, book 4:* or someone has a usufruct in it.

71 (70) MARCELLUS, *Digest, book 8:* In these latter cases, he thought that there could be theft against the inheritance, the things could not be usucapted, and consequently, the heir could have the action for theft.

72 (71) JAVOLENUS, *From Cassius, book 15:* If a person steal a thing which he has borrowed, he can be sued both for theft and on the loan; but if the action for theft be brought, that on the loan is extinguished; if the action for loan were brought, it would be a defense to the action for theft. 1. Where someone possesses as heir a vacant inheritance, although he can usucapt, he will not have the action for theft if something be stolen from it, because a person can sue for theft who has an interest in the thing's not being stolen and he is regarded as having an interest when he stands to lose not to gain.

73 (72) MODESTINUS, *Replies, book 7:* Sempronia prepared a document to give to the centurion for transmission to the office, but she did not carry out her intention. Lucius recited its contents in court as if it had been delivered to the office; the document could not be found in the office, nor was it delivered to the centurion. My question is: What wrong may be asserted against one who had the temerity to read in a court a document, taken from a private house, which had not been given to him? Modestinus replied that if he took it by stealth, theft had been committed.

74 (73) JAVOLENUS, *From Cassius, book 15:* A person who sells a thing pledged to him, when no agreement had been made that he have a power of sale, or, his debt remaining unpaid to him, sells before the time when he would be authorized to sell it, makes himself guilty of theft.

75 (74) JAVOLENUS, *Letters, book 4:* I bought a stolen slave-woman in good faith for two gold pieces, and when she was in my possession, Attius stole her from me. Now both her owner and I are suing Attius for theft. I ask what should be the basis of computation for each of us? The reply is: For the purchaser, double his interest; for the owner, double the woman's value. We should feel no concern that a penalty for theft is to be awarded to two people; for where reparation is made in respect of one and the same thing, the purchaser's justification for an award is his possession of the thing, the owner's, his very title to it.

76 (75) POMPONIUS, *Quintus Mucius, book 21:* If a man, pretending to be another's agent, contrive that I promise something to him personally or to someone to whom he requests me to do so, I am not able to sue him for theft because there is no thing which has been dealt with, with theftuous intent.

77 (76) POMPONIUS, *Quintus Mucius, book 38:* One who uses a thing which he has borrowed or which was deposited with him otherwise than on the terms on which he accepts it, will not be liable for theft, if he believe that he is not acting contrary to the owner's will. In no way will he be liable on a deposit. On the question whether he be liable on a loan there will need to be an evaluation of fault on his part. Should he not have believed that the owner would allow what he did? 1. If someone steal another's thing and then someone steal what he has taken from him, it is the owner who can proceed for theft against the second thief, not the first thief; the reason is that it is the owner, not the first thief, who has an interest in the safety of the stolen thing. This is what Quintus Mucius says, and it is correct; for though the thief has an interest in its safety, since he will be liable to a *condictio* for its value, nevertheless, the interested party who brings the action for theft must have an honest interest. We do not follow the opinion of Servius who held that if no owner of the stolen thing is or will be forthcoming, the thief should have the action for theft; the thing is still not to be regarded as his who is profiting by it. In the result, it is the owner who will have the action for theft against both thieves in such wise that his commencement of proceedings against one does not obstruct the continued availability of an action against the other; the same applies to the *condictio*, since each defendant is liable in respect of a different act.

78 (77) POMPONIUS, *Readings, book 13:* A person who takes a purse of coins is liable

also in respect of the purse, although it was not his intention to steal the purse.

79 (78) PAPINIAN, *Questions, book 8:* A person gave another something to inspect; if the thing were at the recipient's risk, he could bring the action for theft if the thing were taken.

80 (79) PAPINIAN, *Questions, book 9:* If a debtor steal the thing he gave in pledge, what he pays in the action for theft in no way reduces his debt.

81 (80) PAPINIAN, *Questions, book 12:* If I have sold but not yet delivered a slave and, without my fault, he has been stolen, the better view is that I have the action for theft; I should be seen as having the interest in the slave because I am his owner or because I will be liable to yield up actions I have regarding him. 1. Although the action for theft never lies unless we have an interest in the thing, when it is brought on the ground of ownership, my interest must be related, unless it be greater, to the value of the thing; this is evidenced in the case of *statuliberi* and conditional legacies. Any other test would make the amount difficult to determine. And so mere interest is the basis of valuation only in those cases where the action is not grounded on ownership, where the action cannot rest on the full value of the thing itself. 2. If I brought the action for production to choose a slave bequeathed to me and one of the body of slaves from which I was to choose had been stolen, the heir would have the action for theft because he would have the interest; and it is irrelevant on what ground the obligation of safekeeping was due. 3. Since a robber in any case commits theft, he is to be regarded as a manifest thief. 4. But a person through whose wrongful conduct the thing was snatched away would be liable not in the action for theft but in that for things taken by force. 5. If Titius, in whose name a false procurator wrongfully accepts money, ratifies the transaction, Titius himself will have the action for unauthorized administration; the person who paid the money will have the *condictio* for money not due against Titius and against the false procurator the *condictio* for theft; if he choose to sue Titius, the latter may fairly plead the defense of fraud to require him to make over his *condictio* for theft. But if the money was due, the action for theft disappears because the debtor is released from his obligation. 6. A false procurator only steals the money when, posing as the genuine procurator whom the creditor has, he tricks another's debtor. The same applies to one who asserts that money is payable to him as the heir of Sempronius, when the heir is in fact someone else. 7. A person acting on behalf of Titius paid money in his name to the false procurator of his creditor, and Titius ratified the payment; Titius does not get the action for theft, which arose for the payer immediately the money was paid, because Titius had neither ownership nor possession of the coins; Titius will indeed have the *condictio* for what was not due and the payer that for theft; this latter will be surrendered to Titius by the judge's direction, if he be sued by the payer in the action for administration.

82 (81) PAPINIAN, *Replies, book 1:* The action for theft, not the criminal charge of peculation, lies when money is taken from civic funds.

83 (82) PAUL, *Views, book 2:* If a fuller or tailor who receives clothes for cleaning or repair should use them, he would be seen to commit theft of them by this improper use, because he does not receive them for that purpose. 1. When crops are taken from land, both tenant and owner can bring the action for theft because each has an interest in their recovery. 2. One who abducts a slave-woman, not a prostitute, out

of lust will be liable to the action for theft and, if he conceals her, will be liable to the penalty of the *lex Fabia.* 3. One who steals documents or contractual records will be liable in theft for the amount recorded in them; it does not matter whether they have or have not been canceled, because they are the simplest proof of payment.

84 (83) NERATIUS, *Replies, book 1:* If a man appropriates as heir things from the estate of one whom he thinks to be dead, when he is in fact alive, he does not commit theft. 1. When a person has been sued for theft on his own account, he will not, if an action lies against him, in respect of something else as the owner of a slave, be given a defense of theft once committed.

85 (84) PAUL, *Neratius, book 2:* Although a stolen thing cannot be usucapted unless it return into the owner's control, if its value, assessed in action, be paid or the owner sell it to the thief, it must be said that there will be no barrier to the right of usucapion.

86 (85) PAUL, *Handbook, book 2:* A person who has an interest in the thing's not being stolen will have the action for theft, if he holds the thing with the owner's consent, for example, if it be let to him. But someone who conducts affairs unasked or as a tutor, as also an actual tutor or curator, will not have the action in respect of a thing stolen through his fault. Again, a person to whom a thing is due under a stipulation or a will does not have the action for theft, although he has an interest in the thing's safety, nor does the verbal guarantor of an agricultural tenant.

87 (86) TRYPHONINUS, *Disputations, book 9:* If a thing, stolen or taken by force, return to the owner who is unaware of the fact, it is not regarded as returning into the owner's possession, and so, even if, after such possession by the owner, it be sold to a purchaser in good faith, usucapion will not follow.

88 (87) PAUL, *Decrees, book 1:* A creditor has the action for theft for the full value of the pledge, not simply the amount of the debt. But if it be the debtor himself who stole the pledge, it is accepted instead that he would be liable in theft for the amount of the debt and interest thereon.

89 (88) PAUL, *Concurrent Actions, sole book:* If someone proceed by the action for things taken by force, he cannot also take proceedings for theft; but if he first choose to proceed for twofold on theft, he can also have the action for things taken by force, so long as he does not recover more than fourfold over all.

90 (89) PAUL, *Civilian Penalties, sole book:* If a freedman or a client steal from the patron or a hired laborer from his employer, he commits theft but no action for theft arises.

91 (90) JAVOLENUS, *From the Posthumous Works of Labeo, book 9:* A fuller is released from the action on the contract [of hire by the owner]; Labeo says that he cannot then validly bring the action for theft. Again, if he brought theft proceedings before himself being sued on the contract and, before judgment in the action for theft, he be released from liability on the contract, the thief must be absolved as against him. But if none of this has yet happened, the thief must be condemned to him. All this, because he has the action for theft only insofar as he has an interest. 1. No one can give aid and advice to another, who cannot himself have a theftuous intent.

92 (91) LABEO, *Plausible Views, Epitomized by Paul, book 2:* If, when he knows that something is being stolen from him, a man does not prevent it, he cannot have the action for theft. PAUL. Quite untrue; for if someone knows that he is being robbed and, because he cannot prevent it, lies low, he can proceed for theft. But if he could prevent it and did not, he still can have the action for theft. It is in this way that a patron commits theft against his freedman or one held in awe from one who is restrained

from offering resistance by modesty in his presence.

93 (92) ULPIAN, *Edict, book 38:* It must be remembered that now criminal proceedings for theft are common and the complainant lays an allegation. It is not a kind of public prosecution in the normal sense, but it seemed proper that the temerity of those who do such wrongs should be punishable on extraordinary scrutiny. Still if that be the party's wish, he can bring civil proceedings for theft.

3

INCORPORATED MATERIAL

1 ULPIAN, *Edict, book 37:* The *Law of the Twelve Tables* does not allow one to extract a stolen beam from a building or to vindicate one connected with vines (the statute prudently thus effects it that buildings should not on this account be destroyed and that viniculture should not be disturbed); but the statute gives an action for twofold against one found to have made such an incorporation. 1. The term "beam" comprises any material from which buildings are constructed or which are necessary in a vineyard. Hence, some say that there are included also tiles, stones, bricks and so forth, if they be useful for buildings (for the term is derived from "covering"), so that, further, lime and sand are comprised in the definition. Again, in the case of vines, the term includes anything necessary for the vines, such as poles and supports. 2. But the action for production will also be given, for there should be no leniency for a person who built into or bound to a building something which he knows to be another's property. However, we proceed against him not as being in possession of it but as having deliberately contrived no longer to possess it.

2 ULPIAN, *Sabinus, book 42:* But if you assert that proceedings have been taken in respect of stolen materials incorporated into a building, there can be deliberation whether, quite separately, a *vindicatio* for them lies. I have no doubt that it does.

4

A SLAVE, DIRECTED IN THE WILL TO BECOME FREE, IS ALLEGED TO HAVE STOLEN OR DESTROYED SOMETHING AFTER THE DEATH OF HIS OWNER BUT BEFORE THE INHERITANCE HAS BEEN ACCEPTED

1 ULPIAN, *Edict, book 38:* If it be alleged that through the guile of a slave, directed to be free, something be done, after the death of his master and before acceptance of the inheritance, whereby something from the estate of the manumitter does not come into the hands of the latter's heir, an action for twofold will lie against him for a year of days on which business can be done. 1. This action, as Labeo wrote, rests on natural equity rather than on the civil equity, there being indeed no civil action; it is by nature fair that he should not go without penalty who was made the bolder by the expectation that, as he judged, he could not be punished as a slave by reason of his imminent free status nor yet be condemned as a freeman because he had stolen from the inheritance, that is, of his mistress; a master or mistress cannot have an action for theft against his or her own slave, even though he later become free or be alienated, unless he thereafter deal wrongly with something. In consequence, the praetor took the view that the cunning and effrontery of those who despoil inheritances should incur a twofold penalty. 2. A freedman will be so liable only if he be alleged to have made away with something by deliberate wrongfulness. Remissness or negligence on the slave's part is

condoned once he is free, though gross carelessness is one with wrongful intent. Accordingly, if he unintentionally inflicted any damage, this action will not lie although he would otherwise be liable under the *lex Aquilia* for any damage that he might do. Again, the action with which we are concerned has definite limitations, namely that our man acted wrongfully and in the period between his owner's death and the heir's acceptance of the inheritance. But if the slave acted with deliberation or even without, while the master was alive, he would not be liable to this action; indeed, if he did what he did after both the death and the acceptance of the inheritance, this action would have no place. For once the acceptance be made, he can be sued as a freeman. 3. But what if he receives his liberty under a condition? He is clearly not yet free; he can, though, be punished as a slave and so it must be said that there is no scope for our action. 4. Where liberty is immediate, however, it must be said that this action can and should be brought against the slave who has become free. 5. If a slave, the object of an unconditional legacy, tamper with anything which is part of the inheritance, before it has been accepted, it must be said that the present action lies, since the ownership of the slave has changed. 6. Generally, we may say, wherever ownership of the slave is changed or lost or the slave becomes free, within a modest period from the acceptance of the inheritance, this action should be granted. 7. Now if the slave be granted freedom under a *fideicommissum* and he commit any wrong to something, part of the estate, why should the heir be obliged to free him before he has made satisfaction for the wrong? It has been repeatedly ruled by the deified Marcus and by our own emperor and his father in rescripts that there is no impediment to freedom, given unconditionally by *fideicommissum*. However, the deified Marcus, in his rescript, said that an *arbiter* should be given before whom an account could be put. Now this rescript relates to the proferring of an account of the activities of the slave. Therefore, I am of the view that our action would lie. 8. "Before acceptance of the inheritance," we should interpret as "before acceptance by any one of the heirs"; for if only one accept, the result is the slave's freedom. 9. Suppose a *pupillus* to have been instituted heir and, on his death, freedom to be given by the heir substituted to him and, in the meantime, improprieties occur; if, indeed, anything were done while the *pupillus* was alive, there would be no room for our action; but if it were done after his death but before his substitute succeeded, this action would lie. 10. The action is relevant in respect of not only those things which were among the testator's assets but also those in which the heir had an interest that they, through fraud, should not be prevented from coming to him. Hence, Scaevola considers more liberally that if the slave should steal a thing which the deceased had in pledge, this praetorian action would lie. For in this context, we treat goods liberally in terms of their usefulness. After all, if the praetor provided this action in place of the unavailable action of theft, by reason of the thief's servile status, the probability is that it is applicable in all cases where theft proceedings would be possible. And in short, it is acceptable that the action lies in respect of things pledged or held in good faith, though not owned; so also for a thing lent to the testator. 11. In the same way, if the slave, who sees liberty in the offing, interferes with fruits gathered after the testator's death, this action will lie. And the same must be held if issue are born [to slave-women] or young [to animals] after the death. 12. Then again, if an *impubes* acquire the ownership of something after his father's death, and it be stolen before anyone accepts the inheritance of the *impubes*, it must again be said that this action lies. 13. But, really, the action lies in respect of everything in which the heir has an interest in its nonremoval. 14. The action is relevant not only in respect of thefts but in respect of any harm which the slave occasions to the inheritance. 15. Scaevola says that theft is made of what is possessed so that if the thing has no possessor, there is no theft; thus, there cannot be a theft from the inheritance which has no possession, which is a matter of both fact and intent. But, equally, the heir does not, as such, have possession because succession entitles him only to the right to the inheritance, not to the possession of it by that fact. 16. It is, though, true that if the heir has some other way of coming to what is his, this praetorian action is not to be given to him, since condemnation will be in terms of his existing interest. 17. In addition to this action, the *vindicatio* is also available; for our action is analogous to that for theft. 18. Accordingly, it must be said that this action is open to heirs of the original plaintiff and any other of his successors. 19. If several slaves are given their liberty and do something dolosely, each is separately liable in full, that is, for twofold. And, since they are sued in delict, then, as in theft, none is released by the fact that one has been sued and has paid.

2 GAIUS, *Provincial Edict, book 13:* If the slave, somewhat before he achieves his destined liberty, remove or destroy something, the owner, unaware thereof, does not have this action. Hence, in particular, although an heir does not know that something has been taken or destroyed by a *statuliber* or if the same be the case with any other owner in respect of his slave, he can invoke no action after the slave's becoming free, even though, in many other circumstances, pardonable ignorance merits condonation.

3 ULPIAN, *Edict, book 13:* Labeo was of opinion that where a slave conditionally manumitted took something, if the condition were speedily realized, the malefactor could be sued by this action.

5

THE ACTION FOR THEFT AGAINST SHIPS' MASTERS, INNKEEPERS, AND LIVERYMEN

1 ULPIAN, *Edict, book 38:* If a theft be said to have been committed by those who operate ships, inns, or livery stables or by anyone whom they have on their ship or premises, an action will be given, whether the theft be committed by the act and intent of the shipper or of those who were on the ship to sail her. 1. This last we must take to include those aboard for the ship to run, that is, the crew. 2. The action is for twofold. 3. When something be lost at an inn or on a ship, the shipper or the innkeeper is bound by the praetor's edict so that it is in the power of the victim of the theft, as he chooses, to go against the shipper at praetorian law or to bring the civil law action against the actual thief. 4. But if the innkeeper or the ship's master has guaranteed the safety of the goods, it is he and not the owner of the stolen thing who will have the civil action for theft because, by his guarantee, he incurs the risk of safekeeping. 5. But where the shipper is sued in respect of a slave, he can absolve himself by surrendering the slave noxally. Now why is the shipper not condemned personally since he allows so evil a slave on his ship? And why, if he be fully liable for theft by a free member of the crew, is he not liable also for a slave? The reason must be that in engaging a freeman, it is for him to weigh up what manner of man he is, but in the case of his own slave, such evaluation by him may be waived, as for an offense ashore, if he be prepared to surrender the slave noxally. If, though, someone else's slave is involved, he will be liable as for a freeman. 6. The innkeeper is answerable for the deeds of those whom he has in the inn to run the establishment as also of those who reside in the inn; he is not answerable for the acts of passing travelers. For an innkeeper or liveryman is not regarded as choosing his own traveler and cannot refuse those making a journey; but in a way, the innkeeper does select his permanent residents, since he does not reject them, and so should be answerable for what they do. In the case of a ship, there is no liability for the acts of passengers.

6

IF A FAMILY OF SLAVES BE SAID TO HAVE COMMITTED THEFT

1 ULPIAN, *Edict, book 38:* The praetor propounded a most valuable edict whereby to safeguard masters against the delicts of their slaves, namely that if several commit a

delict, masters shall not be stripped of their patrimony by being obliged to surrender them all noxally or to pay damages in respect of each of them. By this edict, the ruling is given that if he indeed be willing to declare the slaves guilty, he may surrender noxally all who took part in the theft; but if he should prefer to make monetary redress, he may offer only what would be due if one freeman had committed the theft, and keep his body of slaves. 1. This concession is made to the master, however, only where the theft took place without his knowledge; if he were privy to the delict, it is not open to him. In such case, he can be sued in respect of himself and by the noxal action of each individual slave, and he cannot make satisfaction by the one amount that a freeman would have to pay. We take him to be privy who knows what is going on and does not prevent it. For we must look to knowledge which also comprises willingness. If the master has knowledge and forbids the slaves who, however, carry on, it must be said that he may avail himself of the benefit of the edict. 2. If several slaves wrongfully inflict damage, it is wholly equitable that the master should have the same concession. 3. When several slaves steal the same thing and issue is joined with the master in respect of one, the action in respect of the others should remain viable until, in the present proceedings, the plaintiff recovers what he would have obtained if one freeman had stolen from him,

2 JULIAN, *Digest, book 23:* that is a twofold penalty and a *condictio* for the value of the thing.

3 ULPIAN, *Edict, book 38:* Whenever the master has paid what would be due if one freeman had been the culprit, the action in respect of the others no longer lies, not only against him but also against the purchaser, if one of the joint wrongdoers shall have been sold. So also if he be manumitted. But if recovery had been made from the now freedman, then the action will be given against the master in the name of the family. For it cannot be said that what was paid by the freedman was, so to speak, paid for the whole family. Of course, if a purchaser makes satisfaction, I think that the action against the vendor should be refused; for in a sense, satisfaction has been made by the vendor against whom [the purchaser] has sometimes had recourse, especially if he had warranted that the slave was free of theft and noxal liability. 1. The question arises whether, if action has been brought against the legatee or heir in respect of a slave who had been bequeathed or donated, action can also be brought against the owner of the rest; I think that it can. 2. The relief envisaged in this edict is afforded not only to the man who, being condemned when in possession of the slaves, makes good what would be due if one freeman had been the thief but also to him who is condemned because it is through his fraud that he no longer possesses them.

4 JULIAN, *Digest, book 22:* This action, open to the testator himself, lies also to the heirs of one from whom several of the one family of slaves have stolen, so that all will recover no more than would be due if a freeman had perpetrated the theft.

5 MARCELLUS, *Digest, book 8:* A body of slaves owned in common committed a theft with the knowledge of one of the owners; an action can be brought against him in respect of all, but against the innocent owner only to the extent stated in the edict. What the second owner makes good, not in respect of the whole family, he will recover in part from the other. And if a slave owned in common inflict damage on the instructions of one owner, what is made good by the other, if action can be taken against him also under the *lex Aquilia* or the *Twelve Tables*, he will recover from his co-owner in similar manner to when harm is inflicted upon common property. Now if we have but two slaves in common, against the one of us who knows what is done, action will lie in respect of each slave; but he will recover from his partner no more than if he had paid in respect of one; if the victim prefer to sue the innocent owner, he recovers only

twofold. Let us see whether an action should not be given to him against his co-owner in respect of the other slave, as if he had made good in respect of all; otherwise, in this case, the praetor's provision would operate harshly; and the party with knowledge should not get leniency.

6 SCAEVOLA, *Questions, book 4:* Labeo thinks that if my co-heir obtained twofold because someone's family of slaves stole something from the estate, that should not prevent my suing for twofold; but there would thus be a fraud on the edict, and it would be unjust that our heirs should get more than we would ourselves. 1. He also says that if the deceased obtained less than twofold, the individual heirs can properly take proceedings. Scaevola replies: I think it more correct that each heir should sue for part but that, including what the deceased received, neither heir should get more than twofold.

7

TREES SECRETLY FELLED

1 PAUL, *Sabinus, book 9:* Should trees be secretly felled, Labeo says that an action can be given both under the *lex Aquilia* and under the *Twelve Tables*; but Trebatius says that each should be so granted that the judge in the second action should deduct what the plaintiff recovered in the first action and condemn for the balance.

2 GAIUS, *XII Tables, book 1:* But it should be known that those who cut down trees, especially vines, are punishable also as brigands.

3 ULPIAN, *Sabinus, book 42:* The majority of the early jurists thought that vines fell within the description "tree." 1. Ivies and reeds are not improperly styled trees. 2. The same applies to willows. 3. But if one plant willow shoots to develop a willow grove and, before they take root, they are cut down or pulled up, Pomponius correctly says that there can be no action for trees felled, because a thing cannot properly be regarded as a tree unless it develops roots. 4. But if someone transfer a tree, root, and branch from a nursery, although it does not yet, as it were, hug the soil, Pomponius, in the nineteenth book on *Sabinus*, approves its being regarded as a tree. 5. Hence, also that is deemed a tree, the roots of which have died. 5a. However, the roots of a tree are not comprised in the term "tree," although embedded in the soil; this view has Labeo's approval. 6. Labeo also says that that is rightly called a tree which, though uprooted, can be replaced or which is so transferred that it can be planted. 7. On the better view, the stock of the olive is a tree whether or not it has yet thrust out roots. 8. And so the action for felled trees may be brought in respect of all these things which we have listed.

4 GAIUS, *XII Tables, book [1]:* There is certainly no doubt that if the plants be so slender that they are like grass, we cannot speak in terms of trees.

5 PAUL, *Sabinus, book 9:* To fell comprises not only cutting down but striking for the purpose thereof. Circling is bark-stripping. Cutting away from below implies that the act has been already done; for a person cannot be regarded as felling who cuts with a saw. 1. The ground of this action is the same as of that under the *lex Aquilia.* 2. A usufructuary of land does not have this action; but one with a long lease of public land does, as also the actions to ward off rain water and for regulating boundaries.

6 POMPONIUS, *Sabinus, book 20:* If several secretly fell the same tree, each is liable in full individually. 1. But if the tree belongs to several owners, one single penalty will be due to them together. 2. If a tree project its roots into a neighbor's land, the neighbor will not have the right to cut them back, but it will be possible for him to claim that the neighbor has no right to have them incorporated in his land (like beams or a projecting roof). Even though a tree be nourished by roots in a neighbor's land, it remains the property of the person on whose land it first grew.

7 ULPIAN, *Edict, book 38:* Those trees are regarded as secretly felled which are cut down without the owner's knowledge and with a view to concealing the fact from him. 1. And Pedius says that this action is not one for theft; for it is possible to cut down trees secretly without theft. 2. A man who pulls up a tree, root and branch, is not liable to this action; for he does not cut it down in any manner; but he will be liable under the *lex Aquilia* as though he had broken it. 3. Even though the tree has not been totally felled, the action will lie as if it had been. 4. Whether a man fell, bark, or cut down a tree with his own hands or tell a slave to do it, he will be liable to the action; so also if he told a freeman to do it. 5. But if the master did not order the slave, who did the cutting down on his own initiative, Sabinus says that the master will be noxally liable as in the case of other delicts; that opinion is true. 6. Though penal, this action is perpetual but does not lie against an heir; it is granted to the heir or other successors of the owner. 7. The condemnation is for double,

8 PAUL, *Edict, book 39:* the basis of assessment being the owner's interest in not being injured; the value of the trees as such will come in and an assessment be made of anything over and above. 1. He fells secretly who fells stealthily. 2. Hence, if he cut the tree down and appropriated it for gain, he will further be liable for theft of the wood and to the *condictio* and the action for production. 3. One who forcibly fells with the owner's knowledge is not subject to this action.

9 GAIUS, *Provincial Edict, book 13:* If it be an agricultural tenant who felled the trees, he will also be liable to the action on letting. But, of course, the plaintiff will have to be content with one action.

10 JULIAN, *From Minicus, book 3:* If it be a twin tree and the join appears above ground, it is held to be a single tree. But if the join be not visible, there are as many trees as there are kinds of them above ground.

11 PAUL, *Edict, book 22:* But if action be brought under the *lex Aquilia* for felled trees, the interdict against force or stealth having issued, the defendant will be absolved if the condemnation in the first proceedings bore heavily enough on him; the action under the *Twelve Tables*, however, remains available.

12 JAVOLENUS, *From Cassius, book 15:* A man can still bring the action in respect of trees felled, even though he has sold the land.

8

GOODS TAKEN BY FORCE AND ON TUMULT

1 PAUL, *Edict, book 22:* A person who forcibly takes something is liable for both nonmanifest theft for twofold and for taking goods by force for fourfold. If the action for taking by force be brought first, the action for theft will be refused; but if the action for theft be brought first, the other will lie to recover the balance available.

2 ULPIAN, *Edict, book 56:* The praetor says: "If any loss be said to have been inflicted with deliberate wrongfulness by armed men on someone or if his goods be said to have been forcibly taken, I will grant an action against the person alleged to have done this. And if a slave be said to have done it, I will grant a noxal action against his master." 1. By this edict, the praetor makes provision against what is done by force. For if someone can show that he has been subjected to force, he can initiate a public prosecution for force; and there are those who think that a public prosecution should not be prejudiced by a private action. It seemed more advantageous, however, that although it be prejudicial to the *lex Julia de vi*, nonetheless, the action should not be refused to those preferring to seek private redress. 2. A person can act with deliberate wrongfulness (the words of the edict) not only when he seizes something himself but also when with premeditation he gathers about him armed men for the purpose of inflicting damage or of committing robbery. 3. Hence, whether the men he uses for robbery be gathered by himself or by someone else, a man is held to act with deliberate wrongfulness. 4. We must understand by "gathered men" men so gathered to do harm. 5. Nothing further is specified, such as of what type, whether freemen or slaves. 6. We use the plural even if only one man has been engaged. 7. Again, if you assert that only one person did harm, I do not think that the expression is incorrect; we should interpret the words to cover a man who uses force alone or with a gang and, in the latter case, whether they be armed or not, so that he is liable under this edict. 8. The mention of deliberate wrong here includes force; for a person who uses force acts deliberately; but a person who acts deliberately does not always use force. Hence, in the present case, deliberation includes force; and even if something be done by guile without force, it is equally covered. 9. The praetor says: "loss"; this term covers all loss, including that effected clandestinely. I do not think, however, that clandestine activity is meant, but loss which is accompanied by violence. It has also been rightly spelled out that if one person alone do something without force, he is not covered by this edict while, if anything be done with a gang, even without force but with intent, that is what concerns this edict. 10. Neither the action for theft nor those of the *lex Aquilia* are made available in this edict, although they sometimes lie also with this

edict; for Julian writes that a robber is a more reprehensible type of thief and that if someone inflict loss with a gang, he can also be sued under the *lex Aquilia.* 11. When the praetor says, "or whose goods are said to have been forcibly taken," we take this to be applicable even if only a single thing be snatched from among the victim's goods. 12. If someone does not himself gather a gang but, being one of the gang, takes something forcibly or inflicts some loss, he is liable to the present action. A question arises whether the edict applies only to loss inflicted or robbery with a gang raised by the defendant or also to such loss or robbery with a gang raised by someone else. The better view is that this latter also is covered, so that all robberies and loss inflicted with a gang raised by another are included so that both the ringleader and the members are liable to this action. 13. In this action, brought within a year of business days, it is the true value of the thing, not the plaintiff's interest in it, which is quadrupled. 14. Again, this action lies in respect of the gang without the requirement of proving which members did the robbing or inflicted the loss. The term "gang" includes slaves, that is, those who are in a condition of servitude, even though they profess to be free or are in good faith serving someone else. 15. I do not think that the plaintiff can proceed by this action against their master in respect of each individual slave; for it is enough that the master should offer the fourfold once. 16. Arising out of this action, there will be noxal surrender of not all the slaves but only of him or them found to have acted wrongfully. 17. This action is generally styled that for goods taken by force. 18. Only he is subject to this action who manifests wrongful intent. Hence, if someone take his own thing by force, he will not be liable to the action for things taken by force, but he will be otherwise punished. And even if he forcibly take back his runaway slave, possessed by another in good faith, he will still not be liable to this action because it is his own thing which he removes. What if it be something pledged to him? It must be said that then he is liable. 19. The action for things taken by force does not lie against an *impubes* who is not capable of the requisite intent; but if one of his slaves or the troop of them be alleged to have done it, he will be liable in either case to the action for things taken by force. 20. If a tax collector make off with my beast, thinking me to be guilty of some tax offense, then, although he be in error, Labeo says that this action does not lie against him; he obviously lacks wrongful intent. But if he should so impound it that it may not graze and so die of starvation, he will be liable to an *actio utilis* under the *lex Aquilia.* 21. If a person impound a beast forcibly driven off, he can be sued by the action for goods taken by force. 22. In this action we do not inquire whether the thing be among the plaintiff's assets or not, but if it be in fact, the action will lie. Hence, whether it be lent, let, or pledged to me, or deposited with me, so that I have an interest in its not being removed, or if I possess it in good faith or have a usufruct or other right in it, such that I have an interest in its not being forcibly taken, it must be said that I have the action under discussion, so that we do not look for ownership but only for the fact that a thing is alleged to have been removed from among my assets, that is, my possessions. 23. And generally, it is to be said that wherever I could have the action for theft for something done by stealth, I will have the present action. Now someone may say: "But we do not have the action for theft in respect of a thing deposited with us." That is just why I added: "if we have an interest in its not being forcibly removed"; for I also have the action for theft, if I have accepted liability for negligence in respect of a thing deposited or if I accept the cost of the deposit other than as a payment for services. 24. It is better said that, even if the action for theft in respect of the thing deposited should lapse, that for goods taken by force remains; for there is no small difference between one who acts stealthily and one who seizes a thing, since the former conceals his wrong, while the latter flaunts it and also commits a crime. Hence, if someone establish that he has even only a modest interest, he has the action for goods taken by force. 25. If my runaway slave should buy some things to use for his own benefit and they are seized, I can bring the action for things taken by force, since those things are part of my assets. 26. Where goods are so seized, it is possible also to bring the action for theft or for damage wrongfully caused or the *condictio*, and, indeed, individual items may be the object of a *vindicatio*. 27. This action is granted to heirs and other successors; however, being a penal action, it is not given against such heirs and successors. But let us consider whether it should not be granted against them to the extent that they may have been enriched through the wrong. I myself think that the praetor did not promise the action against heirs in respect of what may have come to them, because he took the view that the *condictio* would meet the case.

3 PAUL, *Edict, book 54:* If a man seize goods as a slave and action be brought against him as a freeman, then, even though it was possible to bring proceedings against his former owner for a year after the manumission, proceedings cannot properly be instituted against the freedman himself after that year has passed because with whomever proceedings may be possible, the plaintiff is barred. If the action be brought against the erstwhile owner within the year and then proceedings are taken against the freedman, Labeo says that the plaintiff will be met with the defense of *res judicata.*

4 ULPIAN, *Edict, book 56:* The praetor says: "Where loss be said to have been inflicted deliberately in a tumult, I will, in the year when it first be possible to proceed in respect thereof, give an action for twofold against that man, thereafter the action will be for the value." 1. This edict is issued in respect of the loss that someone causes in a tumult. 2. Labeo says that tumult is named from the general category, disturbance, which itself comes from the Greek *ἀπὸ το͂υ θορυβεῖν* (creating a disturbance). 3. What number do we require to recognize a tumult? If two get into a brawl, we do not regard that as a tumult because two persons cannot properly be held to create a tumult; but if there were several, ten or fifteen men, it would be held a tumult. What, then, if there were three or four? It would not be a tumult. Labeo very rightly says that there is a great difference between a tumult and a brawl; for a tumult is of a crowd of men who gather and make a commotion, but a brawl is between two. 4. It must be said that under this edict, not only the man who inflicts loss himself in a tumult is liable but also he who deliberately effects it, that loss be caused in such circumstances, whether he be personally present or not; for there can be the wrongful intent in one not there. 5. It must be said also that he is caught by this edict who comes along and is the instigator of the loss effected, if he be part of the tumult when the loss is occasioned and has the requisite intent; for it cannot be denied that what is done in such tumult is done with his intent also. 6. If, by his arrival on the scene, someone provoke or arouse a tumult by some shouting or act, accusing one person or seeking to arouse compassion for himself, assuming that damage be done by his design, he is liable, although he did not come to create the tumult. The fact is that loss is occasioned in the tumult with his intent. For the praetor requires not that a person summon the tumult but that in it, loss be inflicted through his intent. There exists this difference between the present edict and the earlier one; in that one, the praetor speaks of what is deliberately done with a gang or which is seized even without such gang; here he is concerned with that loss which is deliberately inflicted in a tumult, even though the defendant did not himself convene it, but it came together through his shouts or words or appeal for compassion or if someone else convoked it and he himself was part of it. 7. That is why the first edict, by reason of the gravity of the wrong, laid down a fourfold penalty, but the present one, twofold. 8. That again applies, however, only [in the case of both edicts] in the year when action could first be taken; after that, it is for the value. 9. Moreover, the present edict is concerned with loss inflicted and goods lost, not seized while, under the earlier edict, one may proceed in respect of things taken by force. 10. By goods lost we mean cases where something is left to a

person in a defective state, shattered, perhaps, or broken. 11. This is an *actio in factum* for double the value of the thing, meaning its real value; the assessment is as at the time of judgment and, within the year, is always for twofold. 12. The plaintiff must establish that loss was inflicted on him in a tumult, and if it occurred elsewhere, the action will not lie. 13. If, when Titius belabored my slave, a tumult gathered and, in the disturbance, the slave lost something, I could proceed against Titius because the loss was deliberately inflicted in a tumult; that applies where the beating began for the inflicting of loss. If there were any other reason for the thrashing, the action would not lie. 14. If a man himself convoked the tumult so that in its presence he might flog the slave with a view to insult not to causing loss, the edict applies. For it is true that he, who flogs to affront, acts deliberately and he, who gives occasion for the causing of loss, himself inflicts it. 15. The praetor gives the action against the owner in respect of his slave or the household of them. 16. What was said earlier, in connection with the action for things taken by force, may be repeated here.

5 GAIUS, *Provincial Edict, book 21:* It does not avail a robber, in order to evade the penalty, that he restores the thing before action.

6 VENULEIUS, *Stipulations, book 17:* The statute prohibits the usucapion of something seized or forcibly taken before it has returned into its owner's control.

9

FIRE, COLLAPSE OF BUILDINGS, SHIPWRECK, RAFT, AND SHIP TAKEN BY STORM

1 ULPIAN, *Edict, book 56:* The praetor says: "If a man be said to have looted or wrongfully received anything from a fire, a building that has collapsed, a wreck, or a stormed raft or ship or to have inflicted any loss on such things, I will give against him an action for fourfold in the year when proceedings could first be taken on the matter and, after the year, for the value. I will likewise give an action against a slave or household of slaves." 1. If it be indeed in the public interest that nothing should be looted from these disasters, the utility of this edict is patent and its severity most proper. And although there be criminal prosecutions arising from these crimes, the praetor is nonetheless right in propounding civil actions for such offenses. 2. How are we to interpret "from a fire"; is it the actual fire or the place where the fire breaks out? The better interpretation is "on account of a fire," that is, the looting takes place by reason of the confusion and alarm caused by a fire; in the same way, we speak of something lost in war, meaning lost by reason of the war. So also, if anything be pillaged from land adjacent to the scene of the fire, it must be said that the edict is operative; for it is true that the seizure arises out of the fire. 3. In similar manner, the term "collapse of buildings" refers to the time when the destruction occurs and covers seizure by someone not only from the building which comes down but also from adjacent premises. 4. If there be a suspicion of a fire or a collapse which does not actually happen, let us see whether this comes within the scope of the edict. The better view is that it does not, for nothing is seized from either a fire or a collapse. 5. The praetor also says: "if anything from a shipwreck." Here one may ask whether this concerns someone who takes something at the time of the wreck or also one who takes at another time, that is, after the wreck; for things are said to come from a wreck which lie on the shore after the wreck. The better view is that the edict applies to the time

2 Gaius, *Provincial Edict, book 21:* and place

3 Ulpian, *Edict, book 56:* where the wreck occurs or has occurred, if someone seize something from it. A person who takes away something lying on the shore after the wreck, however, is in such case that he is a thief rather than subject to this edict, as would be someone taking what falls from a vehicle. Nor is someone regarded as looting who picks up something lying on the shore. 1. Then the praetor says: "a raft or ship taken by storm." He is regarded as storming who seizes something in the actual battle or fight with the raft or ship, whether he be himself an attacker or seize the thing from the attacking brigands. 2. Labeo writes that it would be right that this edict should apply where something is seized from a town or country house which has been stormed; for both at sea and in a house, we are disturbed and can be infested by brigands. 3. But not only the actual taker but also one who receives goods seized in such circumstances is liable; for receivers are no less offenders than the aggressor. There is added, though, "with wrongful intent"; for not every receiver is forthwith an offender but one who receives with wrongful intent. For what if he receive in ignorance of the thing's provenance or if he receive the thing to safeguard it and make it secure for the person who has lost it? In neither case should he be liable. 4. Now this action lies not only against one who takes by force but also against one who removes a thing or takes it away or receives it or inflicts damage on it. 5. That there is a distinction between seizure and taking away is obvious; for a thing can be taken away even without force; but it cannot be seized except by force. 6. One who seizes anything from a wrecked ship is liable under this edict. The Greek term for "wrecked" is *’εβράσθη*. 7. What the praetor says of the infliction of damage is applicable only if the damage be deliberate. For if wrongful intent be absent, the edict has no place. How then does one proceed over what Labeo writes that if, when a fire arose therein, I pull down my neighbor's house in self-defense, an action will be granted both against me personally and in the name of my family? Since I do this to preserve my own premises, I am lacking in evil intent. I think, therefore, that what Labeo writes is not correct. But would it be possible to proceed under the *lex Aquilia* in such circumstances? Again, I think not; for a person does not wrongfully so act who seeks to preserve himself when he had no other cause of action; and so writes Celsus. 8. In the reign of Claudius, a *senatus consultum* was passed whereby, if someone should remove the nails from a wreck or, indeed, but one of them, he is liable in respect of all. Again, by another *senatus consultum*, it is provided that those, by whose malice or design, knowledge of a wreck is forcibly suppressed so that no relief may reach the ship or those in peril thereon, shall be subject to the penalties ordained in the *lex Cornelia de sicariis*; but those who seize anything through the miserable plight of the shipwrecked and are designedly enriched will have to give also to the imperial treasury as much as the amount for which an action under the praetor's edict will be given against them.

4 Paul, *Edict, book 54:* Pedius holds that he also can be said to loot from a wreck who, while the wreck is happening, seizes anything in the attendant commotion. 1. On the subject of those who seize booty from a wreck, the deified Antoninus, in a rescript, provided thus: "What you have written to me concerning the wreck of a ship or raft has this relevance, that is to say, that you wish to know what penalty I think should be imposed upon those who are proved to have looted in such case. This, in my opinion, is easily settled. Now it is of the highest significance whether they take what would else

be lost or whether they flagrantly appropriate what could be saved. If it be the more serious latter, the booty appears to be forcibly acquired, and in the case of free offenders, you will have them beaten with clubs and relegate them for three years, or if they be of the lower orders, condemn them to public works for the same period; slaves you will flog with the lash and condemn to the mines. If the goods be of small value, you may release freemen after a cudgeling and slaves after a flogging." Generally, in such cases as in others, careful assessment is to be made in the light of the status of the offender and of the gravity of the offense, so that no sentence may be passed which is more severe or more lenient than the case requires. 2. These actions lie to heirs; they are granted against heirs only to the extent that any benefit has come to them from the wrong.

5 GAIUS, *Provincial Edict, book 21:* If someone remove or seize a thing saved from a wreck, fire, or collapse of a building and put it in another place, he will be liable to the action for theft or that for things taken by force, even though unaware that it comes from a wreck, fire, or collapse of building. Many are of the opinion that where someone appropriates from a wreck something which is lying washed up by the waves, the same applies. This is true if some time has elapsed since the wreck; but if what happens occurs at the very time of the wreck, it is irrelevant whether the seizure be made from the sea itself, the wreck or the shore. We must adopt the same interpretation in respect of what is seized from a raft or ship which has been stormed.

6 CALLISTRATUS, *Monitory Edict, book 1:* A ship is stormed when it is despoiled, sunk, broken up, or holed or its ropes are cut through or its sails are slashed or its anchors seized up from the sea.

7 CALLISTRATUS, *Questions, book 2:* A wide variety of provisions has been made so that nothing should be snatched from wrecks or that no third party interfere in the collecting of them. For the deified Hadrian also by edict ordained that those holding property near the shore should know that if a ship be dashed against or break up within the boundaries of their lands, they are not to despoil the wreck, else governors will grant actions against them to those complaining that their property has been seized, so that if anything be proved to have been taken from the wreck, it may be recovered from the landholder. But in the case of those proved to have looted, the governor is to inflict a grave penalty as on brigands. To facilitate proof in such cases, the emperor allows those who complain that they have suffered in such wise to approach the prefect and then to state their case and ask that the defendants, in proportion to their fault, either be bound or provide verbal guarantors and so be remitted to the governor. It is further provided that the owner of the land where this is said to have happened shall give security that he will be present for the hearing. The senate resolves that in the collection of what has been wrecked, there shall participate no soldier, private individual, or freedman or slave of the emperor.

8 NERATIUS, *Replies, book 2:* If your raft be brought onto my land by the force of the river, you will not be able to exert control over it unless you first give me a *cautio* in respect of any prior damage to me.

9 GAIUS, *XII Tables, book 4:* A person who burns down a building or a pile of corn set beside a dwellinghouse is directed to be bound, flogged, and put to death by fire, if, that is, his act was deliberate and conscious. If, however, he did it by chance, that is, through negligence, he is to make good the wrong, or if his means be inadequate, be more lightly punished. The expression "building" covers every form of edifice.

10 ULPIAN, *Opinions, book 1:* The duteous watchfulness of the provincial governor

shall ensure that night fishermen do not, by display of light, deceive those at sea as though guiding them to some port, thereby leading the ship and its complement into danger and preparing for themselves a damnable prize.

11 MARCIAN, *Institutes, book 14:* If a fire be caused by chance, it merits indulgence unless the carelessness be so great as to be rank and nearer to deliberate intent.

12 ULPIAN, *Duties of Proconsul, book 8:* It is established that it is lawful for anyone to collect with impunity his wrecked property; so ruled the Emperor Antoninus and his deified father in a rescript. 1. Those who deliberately start a fire in a city, if they be of lower rank, are usually thrown to the beasts; but if they be of some standing, they are subjected to capital punishment or certainly deported to an island.

10

CONTUMELIES AND DEFAMATORY WRITINGS

1 ULPIAN, *Edict, book 56:* Wrong is so called from that which happens not rightly; for everything which does not come about rightly is said to occur wrongfully. This in general. But, specifically, "wrong" is the designation for contumely. Sometimes again, by the term "wrong" there is indicated damage occasioned by fault, as we say in respect of the *lex Aquilia;* then, too, we sometimes call unfairness wrong; for when someone delivers judgment unfairly or unjustly, it is called wrong; for it lacks lawfulness and justice, as not being rightful; but contumely derives from despising or deriding. 1. Labeo says that contumely can be perpetrated by act or by words: by act, when an assault is made; by words, there is insult whenever there is no physical attack. 2. Every contumely is inflicted on the person or relates to one's dignity or involves disgrace: It is to the person when someone is struck; it pertains to dignity when a lady's companion is led astray; and to disgrace when an attempt is made upon a person's chastity. 3. Again, a contumely can be effected against someone personally or through others: personally, when a head of household or matron is directly affronted; through others, when it happens by consequence, as when the affront is to one's children or slaves, one's wife or daughter-in-law; for a contumely affects us which is suffered by those who are subject to our power or are the objects of our affection. 4. And if perchance the corpse should be contumeliously treated of a deceased to whom we are heirs or recipients of his estate, we have the action for insult in our own right; for it affects our own reputation, if any insult be directed at the corpse. The same applies if the good repute of one to whom we are heirs be damaged. 5. So far does an affront to our children affect our own honor that if someone should sell another's son, even with his consent, the father will indeed have the action for insult in his own right; but there will be no action on behalf of the son, because there is no affront where the victim consents. 6. Now whenever there be any affront at the testator's funeral or to his corpse, if it occur after the inheritance has been accepted, it must be said that in a sense, the insult is to the heir (for it is always the heir's obligation to vindicate the reputation of the deceased); but if it be before acceptance, the insult is rather to the inheritance itself and it is thus through the inheritance that the heir will acquire the action. Then Julian writes that if a testator's corpse be detained by someone before acceptance of the inheritance, there is no doubt that the action vests in the inheritance. He also thinks that the same is true if, even before the inheri-

tance has been accepted, an affront be perpetrated on a slave who is part of the estate; for the heir will acquire the action through the inheritance. 7. Labeo writes that if, before acceptance of the inheritance, someone thrash a slave, part of the inheritance, who is manumitted by the will, the heir can bring the action for insult; but if the thrashing takes place after the inheritance has been accepted, then, whether or not he knows that he is free, the victim himself can bring the action. 8. Whether a wrongdoer knows or does not know that someone is my son or my wife, Neratius writes that I have the action in my own name. 9. Neratius again says that sometimes the action for insult will lie to three people in respect of the one affront, and the right of action of none will be consumed by reason of proceedings by one. Suppose that my wife who is a daughter-in-power be affronted; the action for insult forthwith becomes available to me, to her, and to her father.

2 PAUL, *Edict, book 50:* But if a husband suffer affront, the wife does not have an action; for it is right that wives should be defended by their husbands but not husbands by their wives.

3 ULPIAN, *Edict, book 56:* We are told that those who can suffer can equally be guilty of contumely. 1. Of course, there are some who cannot be guilty, such as the lunatic and the *impubes* not capable of wrongful intent; they can suffer affront but not be guilty of perpetrating it. For since affront consists in the will of the culprit, it follows that these classes, even if they do strike people or shout abuse, will not be regarded as having committed an affront. 2. Thus, someone can suffer an insult, even though unaware, but no one can perpetrate one without knowing what he is doing, even though he does not know to whom he is doing it. 3. Hence, if someone strike another in jest or during a contest, he will not be liable to the action for insult. 4. If someone beat a freeman, thinking that he is his slave, the position is that he is not liable to the action for insult.

4 PAUL, *Edict, book 50:* If, when I wish to punch my slave, I involuntarily hit you standing next to him, I will not be liable to the action for insult.

5 ULPIAN, *Edict, book 56:* The *lex Cornelia* on contumelies applies to one who wishes to bring the action for insult on the ground that he declares himself to have been beaten or thrashed or his house to have been entered by force. The statute provides that the action shall not be heard by one who is the son-in-law, father-in-law, stepfather, stepson, or cousin of the plaintiff or one closely related to them by blood or marriage or by one who is the patron of any of them or of their parent. And so the *lex Cornelia* gives an action on three grounds: that a person was beaten or was thrashed or that his house was entered by force. It thus appears that every physical affront is covered by the *lex Cornelia.* 1. Between beating and thrashing there is, as Ofilius writes, this difference: to thrash is to hit with the infliction of pain, to beat is without it. 2. House we must interpret not in terms of ownership but as one's place of residence. Hence, whether a person live in a house which he owns or one he rents or has free or by hospitality, the statute applies. 3. What if he live in a country house or park? The same is true. 4. And if the owner has let a farm which is invaded, it is the tenant, not the owner, who can take proceedings. 5. But if entry be made on a farm belonging to someone else, which is being cultivated for the owner, Labeo says that that owner cannot proceed under the *lex Cornelia;* for he cannot have his place of residence everywhere, that is, in each of his country houses. For my own part, I think that the statute applies to any abode in which a head of household may live, although

he does not have his place of residence there. Let us take someone at Rome as an example for the purpose of study; a man may not have his residence at Rome, but if his house at Rome be entered by force, it must be said that the *lex Cornelia* is applicable. But it does not apply to temporary lodgings or brothels; but it concerns those who are not merely transient inhabitants, although the house is not their normal residence. 6. It has been asked whether, when his son-in-power has suffered contumely, the head of household can proceed under the *lex Cornelia*; it has been settled that he cannot and on that all agree. The father will have the praetorian action for insult; but it is the son who will have that under the *lex Cornelia*. 7. Under the *lex Cornelia*, the son-in-power can proceed on every ground, and he is not obliged to give a *cautio* that his father will ratify the proceedings; for Julian writes that a son-in-power, bringing proceedings for affront, cannot be compelled to give such undertaking. 8. Under this statute, it is permissible for the plaintiff to offer the defendant the opportunity of swearing an oath that he was not guilty of the contumely. Sabinus says [in his book *Duties of Assessors*] that praetors follow the example of the statute; and so things stand. 9. It is provided that if anyone write, compose, or publish a writing pertaining to the disgrace or disrepute of another or deliberately bring it about that any of these things be done, whether the publication be in someone else's name or anonymous, then action may be brought over the issue, and if the culprit be condemned, he shall become infamous under the statute. 10. The same penalty is extended by *senatus consultum* to anyone who produces epigrams or an anonymous writing defaming another, as also to one concerned to traffic in such things. 11. And for the person who exposes such offenses, whether he be free or a slave, there is provided a reward according to the wealth of the accused, to be assessed by the judge and, in the case of a slave, liberty may also follow. For it may be that public good emerges from the exposure.

6 PAUL, *Edict, book 55:* This *senatus consultum* is needed when the name is not given of the victim of the defamation; for then, since establishment of the truth is difficult, the senate was of opinion that the matter should be clarified in a public tribunal. If, on the other hand, the name is given, the victim can also proceed by the ordinary action for insult; for he is not to be barred from the private proceedings, although this would preclude public process, because the issue is a private one. Of course, if public proceedings have already taken place, the private action is to be denied; the converse also holds good.

7 ULPIAN, *Edict, book 57:* In his edict, the praetor said: "He who brings the action for insult must particularize what has been done that is affronting"; for one who brings an action which entails infamy should not be vague, at the peril of another's reputation, but should specify and set out in detail the affront that he claims to have suffered. 1. If a slave be said to have been contumeliously killed, why is it that the praetor should not allow the matter to be resolved by a private action to the prejudice of the *lex Cornelia*? The same issue would arise if the plaintiff wish to bring an action "because you administered poison to kill a slave." And so the praetor acts more correctly if he does not allow such an action. Now we normally say that in those cases where public proceedings are possible, we should not be prevented from bringing instead a private action. This is true, but in those cases where the issue is not one which chiefly has public consequences. What, then, do we say of the *lex Aquilia*? Now that action is not chiefly concerned with whether the slave has been killed; in the Aquilian action, the main issue is the loss which the owner has suffered; but in the Cornelian action it is

that the death as such or the poisoning be punished, not that loss be made good. What, then, if someone wish to bring the private action for insult because his head has been struck by a sword? Labeo says that there is no objection because, he says, there is nothing here which has public overtones. This is not true; for who can doubt that it should be said that the assailant can be proceeded against under the *lex Cornelia*? 2. It is further relevant that the affront which someone suffers be specified, so that we may know from the gravity of the offense whether the action for insult should be granted to a freedman against his patron. For it must be remembered that the action for insult is not always given to a freedman against his patron but only on occasion, when the affront which he has suffered be aggravated, as if he be treated as a slave. We allow a patron a restricted right of punishment of his freedman, and the praetor will not listen to the latter complaining of contumely unless there be an element of aggravation; for the praetor does not have to tolerate the slave, now a freedman, complaining against his master that the latter abused him verbally or moderately chastised or corrected him. But if the chastisement be with the lash or rods or if the patron inflict a grievous wound, it is eminently right that the praetor should give succor to the freedman. 3. Equally, if a child not in power wish to proceed against his father, the action for insult is not lightly granted, but only if aggravation suggest it. To those children who are in power, the action is never available, even if there be aggravation. 4. When the praetor says, "let him specify what was done by way of affront," how should that be understood? Labeo says that a person specifies who gives the name of the affront, without any alternatives such as this or that, but the actual affront which he has suffered. 5. Suppose that you inflict several contumelies upon me; for example, a disturbance and a crowd having been created, you enter someone's house, and thereby I suffer, and at the same time, I am subjected to abuse and am thrashed; the question arises whether I can proceed against you separately in respect of each individual affront. Marcellus, following the view of Neratius, holds that a plaintiff must join together in one action affronts which were received at the same time. 6. Our emperor has ruled in a rescript that today one may take civil proceedings in respect of every affront including those which are aggravated. 7. We regard as aggravated an affront which is more serious and more contumelious. 8. Labeo says that an affront may be aggravated by virtue of the person, the time, and its very nature. It is aggravated by virtue of the person, when inflicted on, say, a magistrate, one's parent, or patron; by reason of time, if inflicted at the games or in full view; for Labeo says that it is of great importance whether the affront be perpetrated in the view of the people or in private, the former being aggravated. Labeo says that it is aggravated by its very nature if, say, a wound be inflicted or someone receive a blow in the face.

8 PAUL, *Edict, book 55:* It is the magnitude of the wound which constitutes the aggravation, and sometimes its position, as when one is struck in the eye.

9 ULPIAN, *Edict, book 57:* But it is a matter of discussion, in talking of an affront being aggravated by its very nature, whether that applies only when it is inflicted upon the person or also when it is not a physical assault; for instance, if garments be

torn, an attendant abducted, or abuse shouted. Pomponius says that an affront can be said to be aggravated, even without striking, the person of the victim creating the aggravation. 1. Again, if one person strike or wound another, even though only slightly, in the theater or a public place, he is guilty of an aggravated affront. 2. It matters little whether the victim be a head of household or a son-in-power; an affront to the latter can also be held aggravated. 3. Should a slave commit an aggravated affront, then, if his owner be present, proceedings can be taken against the owner; but if the owner be absent, the slave is to be handed over to the governor who will have him scourged. 4. If a person attempt to debauch another, whether male or female, freeborn or made free, he will be liable for affront. So also if an attempt be made upon the chastity of a slave.

10 PAUL, *Edict, book 55:* There is said to be an attempt upon chastity when it is sought to make the virtuous wanton.

11 ULPIAN, *Edict, book 57:* Not only he is liable for affront who actually inflicts it, that is, who inflicts the blow, but also he who deliberately brings it about or takes steps to ensure that a cheek be struck by a fist. 1. The action for insult is one based on what is good and equitable and will not lie in the event of dissimulation by the victim. For if someone ignore the affront, that is, as soon as he suffers it, he does not direct his mind to it, he cannot, on second thoughts, revive the affront which he let pass. In consequence, the equitable nature of the action removes all fear of its being granted whenever a plaintiff does not come forward in circumstances of equity. Hence, if there has been any agreement of the parties over the affront or if they have made a *transactio* or if the alleged insulter has sworn that he was not guilty, the action for insult will not lie. 2. One may bring the action for insult oneself or through another person, for instance, a procurator or tutor or others who are accustomed to act on behalf of someone else. 3. If someone be affronted on my mandate, the majority say that both I and the person who accepted my mandate are liable to the action for insult. 4. Proculus rightly says that if I hire you to perpetrate an affront, proceedings can be taken against each of us; for it was done by my design. 5. He says the same even if it be my son to whom I gave my mandate for the wrong. 6. And Atilicinus says that equally, if I persuade someone, who else would be unwilling, to obey me in perpetrating an affront, I can be sued in the action for insult. 7. Although the action for insult is not given to a freedman against his patron, the husband of a freedwoman can have an action in respect of her against her patron; for when a wife suffers insult, her husband is regarded as bringing an action for insult in his own right. This is what Marcellus says. For my own part, I have made a note on him that I do not think that this holds good for every affront; for why should the patron be denied reasonable chastisement or, provided it is not lewd, berating even of a married woman? But if she be married to a fellow freedman of the same patron, then we must say that the action for insult is completely unavailable to the husband against the patron. And many share this view. From all this it will be apparent that our freedmen are unable to avenge against us, with the action for insult, not only the affronts that they personally suffer but also those endured by persons in whose not being insulted they have an interest. 8. Obviously, where the son or wife of a freedman should wish to take proceedings, since the action is not allowed to the father or husband, it should not be denied to them for they are suing in their own name. 9. There can be no doubt that the action is available to one alleged to be a slave but who maintains his free status against the man who declares himself his master. This is true whether the prospective plaintiff is being claimed from liberty into slavery or himself is asserting his freedom out of slavery. For here we make no distinction.

12 GAIUS, *Provincial Edict, book 22:* If a man claim as his slave someone whom he knows to be free and he does not do this by reason of an eviction in order to keep his claim for redress for himself, he is liable to the action for insult.

13 ULPIAN, *Edict, book 57:* The action for insult is granted neither to nor against heirs.

The same applies if it be my slave who is the victim; for here again the action will not be granted to my heir. But once issue has been joined, the action can be continued by successors. 1. A person who does something under the public law will not be treated as having done it with a view to affront; for there is no wrong in the administration of the law. 2. If someone be led away for failing to comply with a decree of the praetor, the case is not such that he can bring the action for insult by reason of the praetorian order. 3. If, to annoy me, someone interrupt me in an insulting manner when speaking before some court, I can bring the action for insult. 4. If, in a matter of decreeing honors for someone, a person be unwilling that they should be decreed, for example, a statue or the like, can proceedings for insult be brought against him? Labeo says that he is not liable, even though there be contumely in his conduct; he says that there is a great distinction between whether a thing be done out of contumely and whether a person will not tolerate the honoring of another. 5. Labeo further says that if, when a subsidiary appointment fell to one person but a *duumvir* assigned it to another, the latter cannot have the action for insult in respect of the burden imposed; it is one thing to impose a burden, another to perpetrate an affront. The same should be accepted also in respect of other *munera* and offices wrongly imposed. Hence, also if a judge pronounce his decision wrongfully, the same rule is to be adopted. 6. Those things which are done within the power of a magistrate are not relevant to the action for insult. 7. If someone prevent me from fishing in the sea or from lowering my net (which in Greek is σαγήνη), can I have the action for insult against him? There are those who think that I can. And Pomponius and the majority are of opinion that the complainant's case is similar to that of one who is not allowed to use the public baths or to sit in a theater seat or to conduct business, sit or converse in some other such place, or to use his own property; for in these cases too, an action for insult is apposite. The older jurists, however, gave a tenant, assuming that he was a state tenant, the interdict since there is a prohibition on the use of force to prevent a tenant enjoying what he has hired. Now what are we to say if I forbid someone to fish in front of my house on my approaches? Am I or am I not to be liable to the action for insult? In this context, it has been frequently stated in rescripts that the sea and its shores, as also the air, being common to all, no one can be prohibited from fishing; no more can a person be from fowling, unless it be a case where he can be barred from entering another's land. However, the position has been adopted, although with no legal justification, that one can be banned from fishing before my house or my approaches; hence, if someone be so barred, there can, in those circumstances, be an action for insult. But I can prohibit anyone from fishing in a lake which I own.

14 PAUL, *Plautius, book 13:* Of course, if someone has a particular right in the sea, he will have the interdict for possession of land, if prevented from exercising his right, because this matter pertains to private not to public law in that one is concerned with enjoyment of a right deriving from a private, not a public, origin. For interdicts pertain to private, not to public, matters.

15 ULPIAN, *Edict, book 77:* The question is also raised by Labeo whether, if a person derange another's mind by a drug or some other means, the action for insult lies against him; and he says that it does. 1. If someone be not in fact struck but hands are raised against him and he is frequently afraid of a beating, though not in fact struck, the wrongdoer will be liable to an *actio utilis* for insult. 2. The praetor says: "One who is said to have loudly shouted at someone contrary to sound morals or one

through whose efforts such shouting is effected contrary to sound morals, against him I will give an action." 3. Labeo says that shouting is an affront. 4. The term derives from a mob or gathering, that is, a combination of voices. For when several voices are directed at one person, that is called a shouting, as it were a gathering of voices. 5. But the praetor's qualification "contrary to sound morals" shows that he does not condemn all loud calling after a person, but only that which offends against sound morals and is directed to the disgrace and unpopularity of an individual. 6. Labeo says that "contrary to sound morals" is to be taken as referring not to those of the offender but to those of this city. 7. Labeo also says that there can be such a shouting against one who is absent no less than one who is present. If, say, a person comes to your house while you are away, there is said to be such a shouting, and the same applies if he should go to an inn or tavern. 8. Not only the person who actually gives tongue is guilty of such shouting but also he who incites others to or causes the clamor. 9. "Someone" is inserted in the edict not without purpose; for if the shouting be against a nonspecific person, there is no legal consequence. 10. If a man organize a shouting against someone but it does not take place, he will not be liable. 11. From all this it will be apparent that not all vituperation constitutes a shouting. 12. Only that which is effected loudly in a crowd, whether by one or several, constitutes a shouting. What is not said loudly and in a crowd is not properly called a shouting, but abuse with a view to humiliation. 13. If some astrologer or one offering some other unlawful foretelling, on being consulted, should say that someone is a thief when he is not, there will be no action for insult against him, but he is liable under imperial enactments. 14. An action for insult arising out of such shouting is given neither to nor against heirs. 15. If someone accost maidens, even those in slave's garb, his offense is regarded as venial, even more so if the women be in prostitute's dress and not that of a matron. Still if the woman be not in the dress of a matron and someone accost her or abduct her attendant, he will be liable to the action for insult. 16. By "attendant," we mean one who escorts and follows, whether (as Labeo says) free or slave, male or female; and so Labeo defines an attendant as "one whose role is to follow someone for the purpose of companionship, in public or in private, who is abducted." Slaves who accompany children to school are included among attendants. 17. As Labeo says, the person regarded as abducting is not he who begins to lead the attendant astray but he who achieves the result that the attendant is not with the mistress. 18. Not only he who leads away by force is regarded as abducting but also one who persuades an attendant to desert the mistress. 19. The edict applies not only to one who abducts an attendant but also to one who accosts or follows one of them. 20. To accost is with smooth words to make an attempt upon another's virtue; this is not a shouting but an attempt contrary to sound morals. 21. One who uses base language does not make an attempt upon virtue, but he is liable to the action for insult. 22. It is one thing to accost, another to follow. A person accosts who verbally solicits chastity; he follows who silently walks close behind; and assiduous proximity virtually reveals something disreputable. 23. It must, though, be remembered that not everyone who follows or accosts is caught by this edict (nor does one who so acts, with a view to play together or to perform some proper office, fall forthwith within the edict) but only he who does so contrary to sound morals. 24. I think that a fiancé also should be able to bring the action for insult; for there is an outrage to him in any affront that his betrothed may suffer. 25. The praetor says: "In order that nothing be done that is shaming, if anyone act to the contrary, I will deal with it according to the nature of the issue." 26. Labeo says that this particular edict is superfluous since we can proceed under the general edict on insults. But it appeared to Labeo himself (and he says so) that the praetor wished to speak specifically of this matter; for things which happen and merit redress may appear to be ignored unless they are specially mentioned. 27. The praetor bans generally anything which would be to another's disrepute. And so whatever one do or say to bring another into disrepute gives rise to the action for insult. Here are instances of conduct to another's disrepute: to lower another's reputation, one wears mourning or filthy garments or lets one's beard grow or lets one's hair down or writes a lampoon or issues or sings something detrimental to another's honor. 28. When the praetor says, "if someone act to the contrary, I will deal with it according to the nature of the issue," this means that the praetor has the widest discretion so that if there be anything that influences him in the person of the plaintiff or of the defendant or in the nature of what was done or in the scale of the affront, he will not hear the plaintiff. 29. Papinian says that if, after a complaint has been lodged with the emperor or another magistrate, a person abuses the character of another, proceedings for insult will follow. 30. He also says that one who sells the award to be made in a court decision, as though giving the money, and who is cudgeled on that account by the governor is regarded as condemned for insult; he is treated as having committed an affront to the person in whose decision he was trafficking. 31. If someone wrongfully appropriates another's assets or only one of them, he is liable to the action for insult. 32. Similarly, if someone announce that he is selling a pledge to denigrate me, as though he had received it from me, Servius says that I can bring the action for insult. 33. If someone summon a nondebtor as if he were a debtor, by way of insult, he is liable to the action for insult. 34. The praetor says: "Where a man shall be said to have thrashed another's slave or to have submitted him to torture, contrary to sound morals, without the owner's consent, I will give an action. Equally, if it be said that something else be done, I will, having heard the circumstances, give an action." 35. If someone so inflict an outrage upon a slave that it be done to his master, in my view the master can bring the action for insult in his own right; but if the beating was not directed to the master, the outrage perpetrated upon the slave as such should not be left unavenged by the praetor, especially if it occurred through a thrashing or through torture; for it is obvious that the slave himself feels such things. 36. If a man thrash a slave that he owns in common, he will not be liable to this action since he did what he did by right of ownership. 37. No more could a fructuary proceed against the owner or the owner against the fructuary in such circumstances. 38. The words "contrary to sound morals" are inserted because not everyone who thrashes, but he who thrashes contrary to sound morals, is liable. One who does so by way of correction or reform is not liable. 39. Hence, Labeo raises the question: If a municipal magistrate whips my slave, can I have the action against him as having done so contrary to sound morals? And he says that the judge must investigate what my slave was doing for him to thrash him; if he beat him for an audacious attempt upon his office and insignia, the magistrate must be absolved. 40. A person who beats someone with his fists is also loosely said "to thrash." 41. By torture we mean the infliction of anguish and agony on the body to elicit the truth. Mere interrogation or mild intimidation does not come within this edict. The word will also include what are called "bad quarters." It is when an investigation is conducted with force and bodily torment that there is said to be torture. 42. But if, on the master's instructions, someone puts a slave to the question but exceeds the limit, Labeo says that he is liable to the action. 43. The praetor says: "If anything else be done, I will, having looked into the matter, grant an action." If, indeed, a slave be thrashed or put to the question with torture, an action will be granted against the wrongdoer without more; but if the slave suffer some other affront, an action will not issue without the praetor's looking into the matter. 44. Thus, the praetor does not promise an action for every affront in respect of a slave; if the slave be lightly struck or mildly abused, the praetor will not give an action; but if he be put to shame by some act or lampoon, I think that the praetor's investigation into the matter should take into account the standing of the slave; for it is highly relevant what sort of slave he is, whether he be honest, regular, and responsible, a steward or only a common slave, a drudge or whatever. And what if he be in fetters, branded, and of the deepest notoriety? The praetor, therefore, will take into account both the alleged affront and the person of the slave said to have suffered it and will grant or refuse the action accordingly. 45. An affront to a slave sometimes affects the master also, sometimes not; for if the slave is posing as a freeman or if the person who beats him thinks that he belongs to someone else and would not have done it if he knew that the slave was mine, Mela writes that the striker cannot be sued as having affronted me. 46. If, when his slave has been thrashed, a master bring the action for insult and subsequently sues for wrongful damage, Labeo says that the two issues are not the same for the second action relates to damage caused by fault, the former action to outrage. 47. If I have a usufruct in a slave and you own him and the slave is thrashed or put to the question, you as owner rather than I will have the action for insult. 48. Again, if someone beat a freeman who is in good faith acting as my slave, a distinction must be made; if he was beaten to affront me, I will have the action for insult. The same applies in respect of someone else's slave serving me in good faith, so that we allow the action for insult whenever what is done is done to affront me. Indeed, we do give a master the action for insult in the name of the slave. But if the slave is beaten to get at me, I also have my own action. And the same distinction can be taken in respect of the fructuary. 49. It is more than obvious that if I beat a slave with several owners, each of them has the action for insult.

16 PAUL, *Edict, book 45:* But Pedius says that it would be unfair for condemnation to be for more than the share of each respective owner; and so it will be for the judge to assess the shares.

17 ULPIAN, *Edict, book 57:* But if I did it with the permission of one owner, thinking the slave to belong to him alone, none would have the action for insult. Clearly, if I know that there are several owners, no action will be available to the one who gives me permission, but the others can sue me. 1. If a slave be put to the question by the direction of a tutor, procurator, or curator, it must be said that no action for insult will

lie. 2. My slave is scourged by our magistrate by reason of your design or your complaint to the magistrate. Mela is of opinion that I should be given the action for insult against you for whatever on that account seems right and proper, and if the slave should die, Labeo says that as owner, I can sue for the loss that I have incurred through the affront. This is also the view of Trebatius. 3. Some affronts which, perpetrated by freemen, are regarded as slight (of no consequence) are serious if perpetrated by slaves. For the outrage is enhanced by the station of the person responsible. 4. When a slave effects an affront, he obviously commits a delict; and just as in the case of other delicts, so also a noxal action for insult will issue; but it is in the master's discretion whether he will submit the slave to a thrashing to mollify the victim of the affront; the master will not be obliged to present him for a thrashing but he will have the option of allowing him to be thrashed or, if that would not satisfy the affronted person, of giving him in noxal surrender or of accepting an award of damages in legal proceedings. 5. The praetor says: "by the judge's ruling," that is, by the ruling of a good man in stipulating the extent of the thrashing. 6. If, before the judge, a master presents his slave for thrashing so that the victim may receive satisfaction thereby, and the punishment be inflicted at someone's discretion, and the victim-plaintiff later carries on with his action for insult, he is not to be heard; for one who accepts satisfaction waives his affront. For if one voluntarily waive the affront, it must unquestionably be said that the action for insult no longer lies, any more than it would if the lapse of time extinguished the affront. 7. If, at the instigation of his master, a slave should perpetrate an affront, the master can certainly be sued in his own respect. But if the case be put that the slave has been manumitted, Labeo was of opinion that the action should be given against the freedman himself, because the wrong attaches to the actual wrongdoer, and a slave is not obliged to obey his master in everything; equally, if the slave should kill someone at his master's behest, we proceed against him himself under the *lex Cornelia*. 8. Of course, if the slave do something to protect his master, it would seem that that should stand to his credit, and in the case, a defense could be set up against the plaintiff. 9. If a slave in whom I have a usufruct affront me, I can have a noxal action for insult against his owner for I should not be in worse case because I have a usufruct in him than if I did not. The case is different if he be a slave that I own in common; in such an event, we do not give the co-owner an action because he is himself liable to the action for insult. 10. The praetor says: "If an affront be alleged against one in the power of another and neither the person in whose power he is be present nor any procurator who could take proceedings in the matter, having investigated the matter, I will grant an action to the person alleged actually to have suffered the affront." 11. Where a son-in-power is affronted and his father is present but, through lunacy or some other mental defect, cannot take proceedings, I think that the action for insult should be given to the son; for such a father is like one who is not present. 12. Of course, if the father be present but does not wish to sue, whether because he is at difference with his son or waives or indeed forgives the affront, the better view is that the son should not be granted the action; for even if he be absent, the son is given the action on the probability that were he present, the father would take proceedings. 13. But we believe that the action for insult should sometimes be granted to the son even though the father waive the affront, for instance, if the father be vile and abject, while the son is a decent man; for a grossly debased father should not evaluate the insult to his son by the standards of his own turpitude. Let us put the case of a father in place of whom a curator has, lawfully and properly, been appointed by the praetor. 14. But if a father, after joinder of issue, disappears or a vile father fails to prosecute the proceedings, it must be said that after investigation of the matter, the action should be transferred to the son. The same applies if it be posited that the son has been emancipated. 15. The praetor gives precedence to the father's procurator over those who are actually insulted. But if the procurator neglects the proceedings or is in collusion with or does not provide a substitute for himself against those guilty of the affront, the action for insult lies to the actual victim of the wrong. 16. By "procurator," we understand not only one specifically charged with bringing the action for insult but also one who has general administration of the head of household's affairs. 17. When the praetor says that after investigation of the matter, the action will be granted to the actual victim of the wrong, this is to be interpreted as meaning that in the investigation, there will be considered such issues as how long the father has been absent and when he will return and whether the person who wishes to proceed for insult is more than indolent and so useless as to be inadequate for the conduct of the matter and therefore for the prosecution of the action. 18. When the praetor then says, "one who suffers an affront," this must be taken in the sense that the action sometimes lies to his actual father. Suppose a grandson to have been insulted and his father is about but his grandfather is away; Julian writes that the action for insult should be given to the father rather than to the grandson; for, he says, it is for the father, even while the grandfather is alive, to protect his own son in all things. 19. Julian again writes that not only can a son bring the action himself but he can give a procurator in his stead; for otherwise, he says, if we do not allow him to appoint a procurator, it could be that he being ill and there being no one to prosecute the proceedings, the action would be impeded. 20. Julian also says that if a grandson suffer affront and there be no one to take proceedings in the grandfather's name, the father should be allowed to sue and to substitute a procurator. For everyone who can bring an action in his own right is given the power to put forward a procurator instead; and, says Julian, the son-in-power is deemed to sue in his own right when, the grandfather being absent, the praetor allows him to take proceedings. 21. If a son-in-power bring the action for insult, it is not also available to his head of household. 22. Julian also says that the action for insult can be given to a son-in-power whenever there is no one to proceed as head of household and, in such a case, he is treated as though he were such head. Hence, whether he be emancipated, appointed part-heir to his father's estate, disinherited, or abstain from taking his father's property, prosecution of the proceedings is allowed him. For it would be quite absurd that if the praetor allow him to bring the action while still in paternal power, he should be deprived of the avenging of his wrong by himself becoming a head of household and that the action be transferred to the father who cut him out of his will in whole or part or, which would be even more unworthy, that the action should go to his father's heirs to whom it is beyond doubt that the affront to the son-in-power has no relevance.

18 PAUL, *Edict, book 55:* It would not be right and proper that a person should be condemned for putting to shame a wrongdoer; for the sins of those who do wrong should be noted and noised abroad. 1. If a slave affront another slave, the proceedings should be as if the master had been the victim. 2. If a daughter-in-power be affronted, both her husband and her father have the action for insult. Pomponius correctly thinks that the defendant should be condemned to the father for the amount that he would be condemned if she were a widow, the father being her head of household, and to the husband as if she were independent; for everyone's affront has its own basis of assessment. Thus, if a married woman be independent, she is no less able to bring her own action for insult because her husband has his. 3. If an affront be perpetrated against me by someone to whom I am unknown or who thinks me to be Lucius Titius when I am in fact Gaius Seius, the thing that really matters is that he seeks to insult me; for I am a definite person although he thinks me someone other than I am; and therefore I have the action for insult. 4. But when someone thinks a son-in-power to be a head of household, he cannot be regarded as insulting the son's father any more than he insults her husband when he thinks a woman to be a widow; for no insult is directed to their persons, and there can be no transferring of the imputation to them from the person of the son since the intention of the insulter is directed to the son as being a head of household. 5. But if the wrongdoer knows that his victim is a son-in-power, although he does not know in whose power, I would say, says Pomponius, that the father should be given the action for insult in his own right, so also the husband, if he knows his victim to be a married woman. For one who is not unaware of these facts seeks to insult the father, whoever he be, through the son and likewise the husband through his wife.

19 GAIUS, *Provincial Edict, book 22:* If my creditor, whom I am ready to pay, to my discredit, should call upon my verbal guarantors, he will be liable to me in the action for insult.

20 MODESTINUS, *Replies, book 12:* He replied that if, without the authority of the person who has the right and power to permit such a course, Seia seal up the house of her absent debtor in order to insult him, she can be sued in the action for insult.

21 JAVOLENUS, *Letters, book 9:* Assessment of the insult is to be made as at the time that it was perpetrated and not as at the time that judgment is given.

22 ULPIAN, *Praetor's Edict, book 1:* If a freeman be seized as being a runaway slave, the action for insult lies.

23 PAUL, *Edict, book 4:* Ofilius says that the action for insult lies against one who enters another's house without the latter's permission, even though he be summoning that other to litigation.

24 ULPIAN, *Praetor's Edict, book 15:* If someone be barred by anyone from selling his own slave, he can bring the action for insult.

25 ULPIAN, *Edict, book 18:* If a female slave be debauched, the action for insult will lie; and if the wrongdoer conceal the slave or do something else with a view to theft, the action for theft also, or if it be an adolescent maiden who is debauched, there are those who think that an action under the *lex Aquilia* is also competent.

26 PAUL, *Edict, book 19:* If someone make a mockery of my slave or son, even with his consent, I am regarded as being insulted, as when he takes him into a cook-shop or plays dice with him. But this is so only where the person has the intention of perpetrating an affront. For one can give evil counsel without giving a thought to the master; hence, the need for the action for making a slave worse.

27 PAUL, *Edict, book 27:* Labeo writes that if your father's statue, set over his grave, be smashed with stones, you have not the action for the violation of a tomb but the action for insult.

28 ULPIAN, *Sabinus, book 34:* The action for insult is not regarded as part of our assets until issue has been joined.

29 PAUL, *Sabinus, book 10:* If you manumit or alienate a slave in respect of whom you have an action for insult, you will still be able to bring the action.

30 ULPIAN, *Sabinus, book 42:* Could anyone doubt that a manumitted slave does not have the action for insult in respect of some outrage which he suffered as a slave? 1. If a son-in-power be insulted, although both son and father acquire the action, the assessment of damages will not be the same in each case.

31 PAUL, *Sabinus, book 10:* For the insult to the son can be greater than that to the father by reason of the son's dignified position.

32 ULPIAN, *Sabinus, book 42:* Not even magistrates are allowed to do anything insulting. Hence, if a magistrate be guilty of any affront, whether in his private capacity or acting as a magistrate, he can be sued in the action for insult. But after he has laid down office or even while he is still in office? The better view is that if he be a magistrate who cannot honorably be summoned to litigation, one must wait until he has laid down office. But, if he holds a minor magistracy, that is, one without *imperium,* he can be sued while still in office.

33 PAUL, *Sabinus, book 10:* Where something is done in the public interest according to sound morals, even though it effects an outrage to someone, nevertheless, because

the magistrate does it not to insult but to assert public *maiestas*, he will not be liable to the action for insult.

34 GAIUS, *Provincial Edict, book 13:* If several slaves together beat someone or shout abuse at him, each commits his own offense and, the more of them there are, the greater is the affront. Indeed, there are as many insults as there are participants.

35 ULPIAN, *All Seats of Judgment, book 3:* If an aggravated affront be perpetrated by one who, by reason of his low estate and poverty, has no fear of the action for insult, the praetor must deal severely with the matter and punish the offender.

36 JULIAN, *Digest, book 45:* If I wish to bring the action for insult against a head of household in respect of his son's conduct and he gives a procurator, there will not be deemed to be a defense of the son unless security be given that the judgment will be honored; accordingly, the action will then be granted against the son as not being defended by his father.

37 MARCIAN, *Institutes, book 14:* It is provided by imperial enactments that anything placed on public monuments to someone's dishonor is to be completely removed. 1. Also, under the *lex Cornelia*, it is possible to bring the civil action for insult, condemnation being for a sum assessed by the judge.

38 SCAEVOLA, *Rules, book 4:* It is provided by *senatus consultum* that no one shall carry a representation of the emperor to the odium of another, and anyone acting to the contrary will be put in the public prison.

39 VENULEIUS, *Public Prosecutions, book 2:* No one is allowed to wear dirty garments or to let down his hair on behalf of a defendant unless he be so closely related to him that he could not be obliged, unwillingly, to give evidence against him.

40 MACER, *Public Prosecutions, book 2:* The deified Severus wrote to Dionysius Diogenes as follows: "Being condemned for aggravated insult, you cannot be a decurion. And there will not avail you the error of governors, whether of him who made a declaration in respect of you or of those who, contrary to law, thought you still to be a decurion."

41 NERATIUS, *Parchments, book 5:* A father whose son has been insulted is not to be prevented from bringing two actions, one for the insult to himself, the other for that to his son.

42 PAUL, *Views, book 5:* Appellants should not raise a shouting against a judge; if they do, they will be stigmatized with *infamia.*

43 GAIUS, *Rules, book 3:* One who brings a false action for insult will be condemned by extraordinary process, that is, he will suffer exile or relegation to an island or loss of civic rank.

44 JAVOLENUS, *From the Posthumous Works of Labeo, book 9:* If the owner of the lower premises create smoke to fumigate those of his neighbor above or if the owner of the upper premises throw or pour anything onto those below, Labeo says that the action for insult does not lie. I think this wrong, if it were done with the intention to insult.

45 HERMOGENIAN, *Epitome, book 5:* Nowadays it is normal to deal with insult by extraordinary process, both in respect of the wrong and in respect of the person of the wrongdoer. Slaves are scourged and returned to their owners; freeman of the lower order are beaten with cudgels, and others are punished by temporary exile or by interdiction from something.

11

EXTRAORDINARY CRIMES

1 PAUL, *Views, book 5:* Those who intrude upon or disturb the marriage of others, even if they cannot be charged with a particular crime, are punished by extraordinary process by reason of their proclivity for base desires. 1. It is an affront contrary to sound morals when a person showers another with excrement, smears him with mud and filth, defiles waters, water pipes, or a lake, or contaminates anything to the detriment of the public; against such persons, stern action is taken. 2. One who persuades a boy, abducted by himself or by a corrupt attendant, into indecency or who solicits a woman or girl or does anything for the purpose of impurity or who offers a gift or a reward whereby to induce indecency will, if the offense be complete, suffer capital punishment; if it be not fully effected, he is deported to an island. Corrupt attendants undergo the supreme penalty.

2 ULPIAN, *Opinions, book 4:* Not even veterans are allowed to form illegal gatherings under the guise of religion or of fulfilling some vow.

3 ULPIAN, *Adultery, book 3:* Swindling and actions for despoiling an inheritance are dealt with by process on indictment; but these are not public prosecutions.

4 MARCIAN, *Rules, book 1:* In a rescript, the deified Severus and Antoninus (Caracalla) said that a woman who procured an abortion for herself should be sent into temporary exile by the governor; for it would appear shameful that she could with impunity deprive her husband of children.

5 ULPIAN, *Duties of Proconsul, book 5:* Apart from the action for making a slave worse which lies under the standing edict against one through whose instigation a slave is found to have fled to the emperor's statue to bring his master into disrepute, such a man will be severely dealt with.

6 ULPIAN, *Duties of Proconsul, book 8:* In particular, forestallers and regraters, speculators generally, interfere with and disturb the corn supply, and a check is put upon their avarice both by imperial instructions and by enactments. By imperial instruction, it is provided: "You must further ensure that forestallers and regraters, speculators generally, indulge in no commerce and that the corn supply is not incommoded either by those who hold back what they have bought or by the more affluent who do not wish to sell their wares at a fair price because they anticipate that the next harvest will be less fruitful." The penalties for such persons are varied; for, generally, if they be merchants, they are only banned from trading or, in some cases, relegated to an island, while those of the lower orders are condemned to forced labor. 1. The price of corn is also affected by false measures, concerning which the deified Trajan issued an edict whereby he imposed upon those who used them the penalty of the *lex Cornelia*, just as if, under the statute on wills, a person were condemned because he wrote, sealed or read aloud a will which was false. 2. The deified Hadrian, again, relegated to an island one who used false measures.

7 ULPIAN, *Duties of Proconsul, book 9:* Cut-purses who, exercising forbidden skills in respect of purses, purloin part therein and abstract part and those styled embezzlers, that is, those who direct themselves to another's coffers with a view to theft,

are to be punished more severely than thieves. And so they are condemned to a period of forced labor or are beaten with cudgels and released or are temporarily relegated to an island.

8 ULPIAN, *Duties of Proconsul, book 9:* There are also offenses which it is for the governor to punish as, for example, if someone say that his records are noised abroad; for the prosecution of this matter was entrusted to the prefect of the city by the deified brothers.

9 ULPIAN, *Duties of Proconsul, book 9:* There are activities which allow of punishment according to the custom of the province. For instance, in the province of Arabia, *σκοπελισμόν* is called a crime. Its nature is this: a number of enemies *σκοπελίζειη* the land of the person to whom they are hostile, that is, they place stones as a sign that if anyone cultivate that land, he will die horribly by reason of the plot of those who place the stones; this creates such fear that no one dares to approach this land, fearing the maleficence of those who place the stones. Such conduct the governor should punish severely, even with the capital penalty; for the very act threatens death.

10 ULPIAN, *Duties of Proconsul, book 9:* In Egypt, one who breaks or pulls down the embankments (that is, the mounds designed to contain the waters of the Nile) is also punished by extraordinary process. And according to their station and the measure of their guilt, they are condemned; for some are condemned to forced labor and others to the mines, those to the mines, variously according to their social position. If someone dig up sycamore trees, this offense is treated by extraordinary process with no light penalty because these trees firm up the embankments of the Nile, whereby its floods are regulated and directed. Equally, reductions in the flow are punished; also dikes, sluices, and breaches made in the embankments bring punishment on those responsible.

11 PAUL, *Views, book 1:* And an action is allowed, according to the magnitude of the offense, against itinerant traders who carry around and produce snakes, if anyone be harmed by fear of them.

12

VIOLATION OF A TOMB

1 ULPIAN, *Praetor's Edict, book 2:* The action for violation of a tomb entails *infamia.*

2 ULPIAN, *Praetor's Edict, book 18:* If someone destroy a tomb, the action under the *lex Aquilia* no longer has any application; the [interdict] against force or stealth will have to be brought; Celsus says the same in respect of a statue torn from a funeral monument. He also asks whether something which was not soldered thereto or otherwise affixed remains part of our assets or becomes part of the monument. And Celsus says that it is part of the monument, as would be an ossuary, and, therefore, there is scope for the interdict against force or stealth.

3 ULPIAN, *Praetor's Edict, book 25:* The praetor says: "Where it be said that a tomb has been violated by someone's evil design, I will give an *actio in factum* against him so that he be condemned for what is right and fitting to the person affected. If there be no such person or if he does not wish to sue, I will give an action for a hundred gold pieces to anyone who does wish to take action. If there be several who wish to take proceedings, I will grant the power of suing to him whose cause appears most meritorious. And if anyone dolosely live in a tomb or has some other establishment in what

was built as a tomb, I will give an action against him for two hundred gold pieces to anyone who wishes to proceed against him on that account." 1. The first words show that he alone is to be punished for this, who deliberately violates a tomb; if he lack evil intent, the edict has no place. Hence, persons incapable of such intent, such as *impuberes* as also all who approach with no intention of violating a tomb, are exempt. 2. By "tomb" we understand any place of burial. 3. If someone inter in an hereditary tomb, he may, even though an heir, be liable for violating the tomb, if he does so in contravention of the will of the testator; for as a rescript of the Emperor Antoninus [Caracalla] provides, a testator is entitled to stipulate that someone should not be buried there; and his wish is to be respected. Hence, if he provide only one of his heirs shall do the burying, care will be taken that it is only that one who inters. 4. In the edict of the deified Severus, whereby it is directed that corpses are not to be detained, molested, or forbidden transport through the territory of towns, it is provided that corpses not yet committed to perpetual interment may be moved. And the deified Marcus ruled that those who, on the journey to the tomb, carry the corpse through a village or town do not merit punishment, although such things should not be done without the permission of those authorized to allow such progress. 5. The deified Hadrian in a rescript prescribed a penalty of forty gold pieces, payable to the imperial treasury, for those who bury bodies in a city, as also for the magistrates who allow it, and he directed that the place of burial should be expropriated and the corpse moved elsewhere. What if the municipal law allows burial in the city? We must consider whether, in the light of imperial rescripts, this provision has to be departed from; for the rescripts are of general scope and imperial legislation has its own force and should apply everywhere. 6. Anyone who so wishes may proceed against a person who lives or makes his dwelling in a tomb. 7. As the deified Severus ruled in a rescript, provincial governors are to take severe action against those who despoil corpses, especially if they do so with armed force; if, in the manner of brigands, they do such things armed, they suffer the death penalty; if without arms, they are sentenced to the mines. 8. Those judging an action for the violation of a tomb will assess the damage, taking into account the scale of the wrong, the gain made by the violator, the damage which he has done, and his audacity; but they must never condemn for less than they would if an outsider brought the action. 9. If several have the right of sepulture, do we give the action to each of them or only to him who has exercised it? Labeo rightly says that each of them has the action because he is suing for his individual interest. 10. If the party interested does not wish to bring the action for the violation of a tomb, he can change his mind, before issue has been joined by another plaintiff, and say that he now wishes to sue and be heard. 11. If a slave live or build in a tomb, the noxal action ceases and the praetor grants this action in respect of him; but if the slave does not live there but has a resting place there, the noxal action will be given assuming that one appears to lie. 12. This is a popular action.

4 PAUL, *Praetor's Edict, book 27:* The tombs of enemies have no religious significance for us. Hence, we can take stones from them and put them to any use, and the action for violating a tomb will not lie.

5 POMPONIUS, *From Plautius, book 6:* Our rule is that the owners of land on which they have erected tombs, still have the right of access thereto even after they sell the land. For the terms of sale of land provide that there shall be access and passage for funerals to tombs on the land.

6 JULIAN, *Digest, book 10:* The action for violation of a tomb is given in the first place to the person who has an interest in it. Failing him, if someone else shall have brought the action, then, even though the person best entitled has been away on state business, he will not be given the action over again, on his return, against one who has been condemned in damages. And the person who was away on state service should not be regarded as suffering a disadvantage through this, because this action pertains not to his family affairs but rather to punishment.

7 MARCIAN, *Institutes, book 3:* It is forbidden to let tombs deteriorate; but it is permissible to rebuild a monument which has fallen in but without touching the corpses.

8 MACER, *Public Prosecutions, book 1:* The offense of violating a tomb can be said to come under the *lex Julia de vi publica,* falling within that part of the statute wherein it is provided that nothing shall be done to prevent a person being buried and entombed; for one who violates a tomb does prevent the occupant from being entombed.

9 MACER, *Public Prosecutions, book 2:* In respect of a violated tomb, an action for pecuniary damages is also given.

10 PAPINIAN, *Questions, book 8:* The question was asked whether the action for the violation of a tomb lay to a *heres necessarius* who did not concern himself with the estate. I said that he could properly bring this action which derives from what is good and right. For even if he does take proceedings, he will not be in fear of creditors of the estate since, although this action comes with the inheritance, it is not acquired through the will of the deceased, nor does it lie for the recovery of a thing, but it is directed simply to punishment.

11 PAUL, *Views, book 5:* Those guilty of violating tombs, if they remove the bodies or scatter the bones, will suffer the supreme penalty if they be of the lower orders; if they be more reputable, they are deported to an island. Otherwise, the latter will be relegated and the former condemned to the mines.

13

EXTORTION WITH MENACES

1 ULPIAN, *Opinions, book 5:* If extortion occurs on the pretended order of the governor, the governor of the province will order the return of what has been obtained and will punish the wrong.

2 MACER, *Public Prosecutions, book 1:* The process for extortion is not public; but if a person receive money because he has threatened to accuse someone, there can be a public prosecution under the *senatus consulta* which extend the penalty of the *lex Cornelia* to those who conspire to accuse the innocent or who accept money for laying or refraining from accusation or for giving or not giving evidence.

14

CATTLE THIEVES

1 ULPIAN, *Duties of Proconsul, book 8:* On the punishment of cattle thieves, the deified Hadrian sent the following rescript to the council of Baetica: "Since cattle thieves are to be most severely punished, they are usually condemned to death. But condign

punishment does not apply everywhere but only in places where this sort of offense is rife. In other cases, they are condemned to forced labor, sometimes temporary." 1. Correctly speaking, they are offenders of this kind who drive off beasts from pastures or herds and ravage in some way, and they practice their activity almost as an art, driving away horses and oxen from their herds. But if someone take off a straying ox or horses left in the wilds, he is not a cattle thief as such, rather an ordinary thief. 2. Those who make off with a pig or goat or a wether should not be punished so severely as those who drive off the larger beasts. 3. Now although Hadrian prescribed the mines, forced labor, and even death as punishments, those born of respectable rank should not be subjected to such punishment but should be relegated to an island or removed from their civic order. Those who drive off cattle at swordpoint are not improperly exposed to the beasts. 4. One who drives off cattle, over the ownership of which he has raised a dispute, should be remitted, as Saturninus writes, to civil proceedings. This, however, is to be accepted only where he makes a claim of right in good faith and not as a pretext for thieving.

2 MACER, *Public Prosecutions, book 1:* The offense of cattle stealing is not dealt with by a public prosecution, because it is rather a form of theft. But since cattle thieves frequently employ arms, it is accepted that if they be apprehended, they are to be severely punished.

3 CALLISTRATUS, *Judicial Examinations, book 6:* According to the number of sheep driven off, a man will be an ordinary thief or a cattle thief. Some held the view that ten sheep make a flock; and if four or five pigs or even a single horse or ox be driven off, the offense of cattle stealing is committed. 1. Punishment should be more severe for one who drives off a broken-in animal from its stall and not from the woods or a herd. 2. Those who have often committed this offense, although they take only one or two animals, are cattle thieves. 3. The penalty for those who harbor cattle thieves is laid down in a letter of the deified Trajan; they are to be relegated from the land of Italy for ten years.

15

COLLUSION

1 ULPIAN, *Praetor's Edict, book 6:* A double dealing prosecutor, a prevaricator, is like one straddling both sides; for he assists the other party, betraying his own client. Labeo says that the term derives from a manifold contest; for the prevaricator acts on both sides, not on one alone. 1. He is properly called a prevaricator who prosecutes in a public prosecution; an advocate is not correctly so styled. What happens to him?

Whether he is in collusion in private or in public proceedings, he is punished by the extraordinary process.

2 ULPIAN, *Duties of Proconsul, book 9:* It should be known that nowadays one guilty of collusion is punished by the extraordinary procedure.

3 MACER, *Public Prosecutions, book 1:* The action for collusion is sometimes public, sometimes introduced by practice. 1. For if the defendant in a public proceeding assert to his accuser that he has been previously charged with the same offense by someone else and been acquitted, it is provided by the *lex Julia* on public prosecutions that the present proceedings cannot go on until the collusion of the previous accuser has been established and a declaration thereof made. And so the declaration of such collusion is held to be in public proceedings. 2. But if the charge of collusion be leveled against an advocate, the proceedings are not public, and it does not matter whether he be alleged to have been in collusion in public or in private proceedings. 3. Hence, if someone be accused on a charge that he abandoned a public prosecution, the proceedings will not be public, because no provision therefor is made in any statute and no public process was introduced by the *senatus consultum* which prescribes a penalty of five pounds of gold for one who abandons a prosecution.

4 MACER, *Public Prosecutions, book 2:* If someone, for whose bringing a false accusation process is not permitted, be declared guilty of collusion in a public prosecution, he will become *infamis.*

5 VENULEIUS SATURNINUS, *Public Prosecutions, book 2:* An accuser who is convicted of collusion is by statute not allowed to prosecute again.

6 PAUL, *Public Prosecutions, sole book:* In a rescript of our emperor and his father, it has been ruled that those guilty of collusion in respect of offenses dealt with by extraordinary proceedings shall be subject to the same penalty, as that to which they would be liable if they had themselves contravened the statute, of the contravention of which the defendant has been acquitted by reason of their collusion.

7 ULPIAN, *Census, book 4:* In all cases save those involving the issue of blood, one who buys off the accuser is to be condemned under the *senatus consultum.*

16

HARBORERS

1 MARCIAN, *Public Prosecutions, book 2:* Of the basest is the class of harborers without whom no one could long lie low; and it is ordained that they should be treated like brigands. Those who, when they could apprehend brigands, let them go on receipt of money or a share of their loot, are in the same category.

2 PAUL, *Civilian Penalties, sole book:* Those who harbor a brigand who is a relative by blood or marriage should neither be absolved nor yet severely punished. For their offense is not equal to that of those who harbor brigands with whom they have no connection.

17

THIEVES WHO LURK ABOUT BATHS

1 ULPIAN, *Duties of Proconsul, book 8:* Thieves by night are to be dealt with by extraordinary process and, on the investigation of the matter being completed, punished, provided that we bear in mind that a reasonable limit of temporary forced

labor be not exceeded. The same applies to thieves from the baths. But if thieves defend themselves with weapons, or burglars and their like strike someone, they are to be sent to the mines or, if of respectable rank, banished.

2 MARCIAN, *Public Prosecutions, book 2:* But if they commit a theft in the daytime, they are to be subjected to civil proceedings.

3 PAUL, *Military Penalties, sole book:* A soldier caught stealing in the baths is to be discharged with ignominy.

18

BREAKERS OUT OR IN AND ROBBERS

1 ULPIAN, *Duties of Proconsul, book 8:* The deified brothers, in a rescript to Aemilius Tiro, ruled that those who break out of prison and escape are to be punished. And Saturninus endorses the view that those who break out of prison, whether by breaking down the doors or through a conspiracy with others detained like themselves, are to be punished by death; but if they escape through the laxity of the jailers, their punishment should be less severe. 1. Robbers, who are more heinous thieves (that is, plunderers), are normally condemned to forced labor, whether in perpetuity or for a limited period, because those of better class are removed for a time from their civic rank or directed to quit the boundaries of the homeland. For them, no particular penalty is prescribed by imperial rescripts, and so their punishment is a matter for the discretion of the person conducting the *cognitio,* once the investigation is completed. 2. Cutpurses, pickpockets, and burglars are to be similarly punished. For the deified Marcus directed that a Roman knight, who was a burglar and who, having broken down and penetrated a wall, stole some money, should keep away from the province of Africa from which he came, the city of Rome, and Italy as a whole for five years. Punishment should, though, be inflicted on burglars and the others listed above after the hearing of the case, according to what comes out in the hearing, provided that, in the case of the lower orders, it does not go beyond forced labor and, for those of gentler rank, banishment.

2 PAUL, *Duties of Prefect of the City Guard, sole book:* The punishment for burglars varies. For nocturnal intruders are the more heinous, and so, having been cudgeled, they are usually sent to the mines. But those who break in by day, having been similarly beaten, are sentenced to forced labor for life or for a term.

19

THE DESPOILED INHERITANCE

1 MARCIAN, *Institutes, book 3:* If someone plunder the inheritance of another, he is to be punished by extraordinary process on being charged with such offense, as is laid down in a proposal of the deified Marcus.

2 ULPIAN, *Duties of Proconsul, book 9:* If a charge of despoiling an inheritance be laid, the provincial governor must arrange to investigate it; for, where no action for theft can be brought, there remains only the aid of the governor. 1. It is clear that

this offense can be alleged in a case where no action for theft can be brought, that is, before the inheritance has been accepted or, although it has been accepted, the heir has not taken possession of the assets. For it is obvious that in such circumstances, no action for theft will lie; but it is no less obvious that the action for production will lie, if the plaintiff wish to bring a *vindicatio* for what is produced.

3 MARCIAN, *Public Prosecutions, book 2:* Antoninus and the deified Severus provided in a rescript that a party has the choice whether to prosecute the offense of despoiling an inheritance by extraordinary process before the prefect of the city or the provincial governor or to bring a *vindicatio* for the inheritance from those possessing it, under the ordinary law.

4 PAUL, *Replies, book 3:* Hereditary goods belong to all the heirs in common, and so the heir who successfully institutes proceedings for the offense of despoiling the inheritance is regarded as also benefiting his co-heir.

5 HERMOGENIAN, *Epitome of Law, book 2:* A wife cannot be accused of the offense of despoiling an inheritance because one could not proceed against her for theft either.

6 PAUL, *Neratius, book 1:* If you appropriate a thing, part of an inheritance, being unaware that it is so, he replied that you are guilty of theft. PAUL. There can be no theft of a thing part of an inheritance any more than of anything which has no owner and the belief of the appropriator alters nothing.

20

SWINDLING

1 PAPINIAN, *Replies, book 1:* Process for swindling ranks neither as public nor as private process.

2 ULPIAN, *Sabinus, book 8:* The action for swindling does not indeed involve *infamia*, but the offense is punished by extraordinary process.

3 ULPIAN, *Duties of Proconsul, book 8:* A charge of swindling is a matter for investigation by the provincial governor. 1. It should be known that this charge can be leveled against those guilty of fraud but against whom no specific offense can be alleged. For what the action for fraud is in the field of private litigation, that is, the prosecution of swindling in the matter of offenses. And so, wherever the name of a specific offense is lacking, there we can charge swindling. It is particularly relevant in the following cases: Suppose that a person, having pledged something to another, conceal this obligation and, by cunning, sell the thing or give it in exchange or by way of satisfaction to a third party; these are all cases of swindling. Again, if he substitute goods which he has sold or divert elsewhere or ruin those which are subject to security rights, he is equally guilty of swindling. So also if he be guilty of some imposture or collusion to another's detriment, he can be charged with swindling. But as I have said generally, in the absence of a specific offense, this charge can be brought, and there is no need to list the instances. 2. The penalty for swindling is not laid down by statute; for it is not a statutory offense. But those guilty are punished by extraordinary process. In the case of the lower orders, the penalty is not to exceed condemnation to the mines; those who have some position of rank, however, are to be temporarily relegated or removed from their civic order. 3. In particular, a person who conceals wares can be charged with this offense.

4 MODESTINUS, *Penalties, book 3:* There will be a charge of swindling for perjury when someone swears in writing that what are pledges belong to him and he will be sent into temporary exile.

21

REMOVAL OF A BOUNDARY STONE

1 MODESTINUS, *Rules, book 8:* There is no pecuniary penalty for uprooting boundary stones, but punishment is administered according to the rank of the offender.

2 CALLISTRATUS, *Judicial Examinations, book 3:* The deified Hadrian issued a rescript in the following form: "There can be no doubt that those who move stones set to mark boundaries are guilty of a most heinous act. The extent of the penalty, however, should be determined in the light of the rank and intent of the offender. If those convicted be of high rank, they have doubtless done it to encroach on someone else's land, and they may be relegated for a period according to their age; thus, if they be young, it will be a longer period, if they be elderly, shorter. But if the offenders be acting on behalf of another and performing some service, they are to be beaten and sent to forced labor for two years. If they appropriate the stones through ignorance or casually, it is enough that they be thrashed."

3 CALLISTRATUS, *Judicial Examinations, book 5:* A pecuniary penalty is imposed upon those who deliberately move established boundary stones out of their position and territory under the agrarian statute introduced by Gaius Caesar; for the statute provides that fifty gold pieces shall be paid to the public treasury for each stone thrown away or moved and that anyone who wishes may bring the proceedings. 1. Another agrarian law, introduced by the deified Nerva, provides that if a slave, male or female, should deliberately so act without the knowledge of his or her owner, he or she is to be put to death unless the master or mistress be prepared to accept a fine. 2. Those, again, who, to confuse boundary issues, change the face of the land, for example, making a plantation out of tilled land or making arable land of a wood or doing something else of the sort, will be punished according to their rank and degree and the violence of what they have done.

22

COLLEGIA AND ASSOCIATIONS

1 MARCIAN, *Institutes, book 3:* Provincial governors are directed by imperial instructions not to tolerate secret social *collegia* and that soldiers are not to form *collegia* in camp. But the lower orders are allowed to pay a small monthly fee, provided that they meet only once a month, lest an unlawful association be created under this guise. And the deified Severus stated in a rescript that this applies not only at Rome but also in Italy and the provinces. 1. There is, however, no ban on assembly for religious purposes, so long as there is no contravention of the *senatus consultum* which prohibits unlawful *collegia*. 2. It is not permitted to belong to more than one *collegium*, as

was laid down by the deified brothers; and if someone belong to more than one, it is provided by rescript that he must choose the one to which he wishes to adhere and receive from the association which he leaves the share of the common fund which is due to him.

2 Ulpian, *Duties of Proconsul, book 6:* Anyone instituting an unlawful association will be liable to the penalty imposed upon those found guilty of occupying public places or temples with armed men.

3 Marcian, *Public Prosecutions, book 2:* If there be any unlawful *collegia*, they are dissolved under imperial instructions and rulings and *senatus consulta;* but on their dissolution, it is permissible for the members to share out between them any common funds that exist. 1. Above all, unless an association or other such body be formed with the authority of a *senatus consultum* or of the emperor, it is created in contravention of the *senatus consultum* and of imperial instructions and rulings. 2. Slaves, too, with the consent of their masters, may be admitted to the associations of the lower orders; those in charge of such associations should know that if they admit slaves to such associations without the master's knowledge or consent, they will henceforth be liable to a penalty of a hundred gold pieces per slave.

4 Gaius, *XII Tables, book 4:* Co-members are those who belong to the same association, what the Greeks call an *ἑταιρεία*. A statute gives them the power to enter into any agreement they like, so long as they do not contravene the public statute. This statute appears to have been adopted from the law of Solon which says: "If the inhabitants of a city district or precinct be in association for the purpose of holding religious feasts or of dining together or to provide for their burial or if they be members of the same club or they combine to engage in some enterprise or for profit, anything that they agree between themselves will be valid unless forbidden by public statutes."

23

POPULAR ACTIONS

1 Paul, *Edict, book 8:* We describe as a popular action one which looks to the public interest.

2 Paul, *Edict, book 1:* If more than one wish to bring the action, the praetor will choose the most suitable plaintiff.

3 Ulpian, *Edict, book 1:* But, if proceedings be brought more than once on the same ground, the common defense of *res judicata* will lie. 1. In the case of popular actions, preference is given to the person who has an interest in bringing the proceedings.

4 Paul, *Edict, book 3:* A popular action is granted to a competent person, that is, one whom the edict allows to bring proceedings.

5 PAUL, *Edict, book 8:* The defendant in a popular action can appoint a procurator to conduct his defense, but the plaintiff cannot proceed through a procurator.

6 ULPIAN, *Edict, book 25:* Women and *pupilli* are not granted a popular action unless the matter is one which affects them.

7 PAUL, *Edict, book 41:* Popular actions are not transmissible to one to whom an inheritance is handed over under the *senatus consultum Trebellianum.* 1. Again, a person who has such an action is not regarded as being enriched thereby.

8 ULPIAN, *Edict, book 1:* No popular action is transmissible to heirs or is available for more than a year.

BOOK FORTY-EIGHT

1

CRIMINAL PROCEEDINGS

1 MACER, *Criminal Proceedings, book 1:* Not all trials in which an offense is concerned are public criminal trials, but only those which arise from the statutes on criminal proceedings, such as the *lex Julia* on treason, the *lex Julia* on adultery, the *lex Cornelia* on murderers and poisoners, the *lex Pompeia* on parricide, the *lex Julia* on embezzlement, the *lex Cornelia* on wills, the *leges Juliae* on *vis privata* and *vis publica*, the *lex Julia* on electoral corruption, the *lex Julia* on extortion, and the *lex Julia* on the corn dole.

2 PAUL, *Praetor's Edict, book 15:* Some criminal proceedings are capital while others are not. Capital [proceedings] are those where the penalty is death or exile, which here means interdiction from fire and water, because by these penalties civil status is taken away. Other [sentences] are not properly referred to as exile but as relegation; for in them citizenship is retained. Noncapital [proceedings] are those where the penalty is a fine or some form of corporal punishment.

3 ULPIAN, *Sabinus, book 35:* A public accusation lapses, should the person charged, male or female, die beforehand.

4 PAUL, *Edict, book 37:* It sometimes happens that there may be a preliminary inquiry by means of a private action before a criminal trial, such as an Aquilian action, an action for theft or for the removal of goods by force, or an interdict against force or for the production of a will; for in these cases matters concerning the *familia* are at issue.

5 ULPIAN, *Disputations, book 8:* Someone who has been charged must clear himself and cannot bring an accusation until he has been discharged; for it is recognized in the constitutions that a charged person is cleared, not by bringing a counter charge, but by his innocence. 1. It is not certain whether he can only bring an accusation if he has actually been found not guilty, or [if he can do so] when he has undergone the penalty; for it has been laid down by our emperor and his deified father that after being found guilty a person cannot begin an accusation. I think, however, that this applies only to those who have lost citizenship or freedom. 2. It is clearly permissible for those who have initiated prosecutions before being found guilty to carry them through afterward.

6 MARCIAN, *Institutes, book 14:* On the death of a person who was charged with an offense and the penalty ceasing to have effect, [the judge] who has cognizance in pecuniary matters ought to have cognizance in any cause whatsoever arising from the now nonexistent charge.

7 MACER, *Criminal Proceedings, book 2:* It is not a conviction for every offense that makes [a man] infamous, but only that charge which stemmed from criminal proceedings. Thus, where the offense was not a matter for public criminal proceedings, infamy will not attach to the condemned man, unless the charge arose from an action which, even in a private trial, brings infamy on him, such as for theft, the removal of goods by force, or *injuria*.

8 PAUL, *Criminal Proceedings, sole book:* The [former] system of [courts] dealing with capital offenses has fallen out of use; however, the penalties under the statutes [setting up that system] still survive when charges are proved *extra ordinem.*

9 MARCIAN, *Criminal Proceedings, book 1:* It is to be noted that if [a master] does not defend his slave who has been accused on a capital charge, this is not to be regarded as abandoning him; and accordingly, if [the slave] is acquitted he does not become free but remains his master's property.

10 PAPINIAN, *Definitions, book 2:* As between accuser and accused, once the trial has begun, an excuse for absence is to be allowed for good cause; nor is the accused to be condemned [even] if he has been cited three times a day over a three-day period; nor, if the accused is present, may a verdict of calumny be pronounced on the absent accuser.

11 MAECIAN, *Criminal Proceedings, book 10:* A slave may equally well be defended by his master's *procurator* as by his master.

12 MODESTINUS, *Penalties, book 3:* [The judge] who is going to hear persons in custody in a *civitas* of the province which he governs must summon both the men of senatorial rank and all the patrons of causes, if they live in that *civitas.* 1. And it is laid down in a rescript that those in custody can be heard on ferial days, so that [the judge] may discharge the innocent and may continue [the cases of] the guilty who need more severe punishment.

13 PAPINIAN, *Replies, book 15:* On the death of an accuser, the case may be carried through by someone else at the discretion of the provincial governor. 1. A *procurator* intervenes in vain to follow up a charge in a criminal trial, and even more so in the case of the defense; but the excuses of those who are absent are to be brought to the attention of the judges in accordance with the *senatus consultum,* and if there is good reason for them, sentence is postponed.

14 PAPINIAN, *Replies, book 16:* The provincial governor had pronounced sentence for calumny on a father after certain slaves of his son-in-law had been accused by the father-in-law of poisoning [his daughter]. I gave the opinion that the father of the dead woman was not to be reckoned as infamous, since, even if criminal proceedings had been mounted between free persons over the death of the daughter, the father might make an accusation without risk.

2

ACCUSATIONS AND INDICTMENTS

1 POMPONIUS, *Sabinus, book 1:* A woman is not permitted to charge someone in criminal proceedings unless, indeed, she is pursuing the death of her parents or children, her patron or patroness, or their son or daughter or grandson or granddaughter.

2 PAPINIAN, *Adulteries, book 1:* In certain cases, women are allowed to bring a public accusation, for instance, if they are pursuing the death of those persons, male or female, against whom, under the statute on criminal [proceedings], they do not give testimony against their will. And the senate made similar provision in the *lex Cornelia* on wills; but women are allowed to speak in criminal proceedings about the will of their father's or mother's freedman. 1. A *pupillus* is permitted, with the approval of his tutors, to pursue the death of his father or grandfather, and the same is allowed to a female in pupillage; but the deified Vespasian in accordance with the [Cornelian] law

on wills permitted pupils to raise an action about the will of their father [only], and he did not permit [this] about other [wills]; but they can proceed by interdict as if the will were not produced.

3 PAUL, *Adulteries, book 3:* The layout of forms of indictment is as follows:

"Consul and date. L. Titius announces in the presence of 'S,' praetor or proconsul, that he accuses Maevia under the *lex Julia* on adultery, stating that she has committed adultery with G. Seius in the *civitas* of 'A,' at the house of 'B,' in the month of 'C,' in the consulship of 'D' and 'E.'" For there must certainly be set out the place in which the adultery was committed, the person with whom it is said to have taken place, and the month; for this is laid down by the *lex Julia* on criminal proceedings and is a general requirement for all those who bring a charge against another; but he shall not include the day and hour unless he wishes. 1. But if the documents of indictment are not set out in legal form, the name of the one charged is deleted, and there shall be power to renew the charge all over again. 2. Again, the person who lodges the accusation must sign his declaration, or someone else [must do so] on his behalf if he is illiterate. 3. However, if he is bringing a further charge, for example, that someone made his house available for a *stuprum* against a *mater familias*, [or] that he let go an adulterer caught in the act, [or] that he accepted a bribe for a detected *stuprum* and anything else of this kind, it must be included in the accusation. 4. Should the accuser die, or should there be any other obstacle to his bringing the accusation, or anything else of the kind, the name of the one charged is deleted if he so requests; and this is laid down by the *lex Julia de vi* and the *senatus consultum*, but in such a manner that it is permissible for someone else to start the accusation over again. We shall see within what time this may be done; the thirty *dies utiles* must certainly be observed.

4 ULPIAN, *Adulteries, book 2:* A person condemned in criminal proceedings has no right to bring an accusation, unless he is pursuing the death of his children [or parents], or of his patrons in that trial, or matters touching himself. Furthermore, the right of accusation is taken away from those who are branded with calumny, as also from those who have been sent to the arena to fight with the beasts, from stage players and pimps, or from anyone adjudged in criminal proceedings to have done anything by way of *praevaricatio* or calumny, or found to have accepted money for the purpose of bringing an accusation or of causing trouble for someone.

5 ULPIAN, *Adulteries, book 3:* There is no doubt that slaves also can be accused of adultery; but those who are debarred from accusing freemen of adultery will also be debarred from accusing slaves. Under a rescript of the deified Marcus, a master may institute an accusation even against his own slave. Accordingly, after this rescript, the master will be under the necessity of instituting a [formal] accusation against his slave, but the married woman will lawfully make use of a *praescriptio* [that the slave must be condemned first].

6 ULPIAN, *Duties of Proconsul, book 2:* Minor charges should be heard and investigated by the proconsul out of court. He should either free those against whom they are brought, or have them beaten with rods, or, if they are slaves, flogged.

7 ULPIAN, *Duties of Proconsul, book 7:* If a charge is to be brought against anyone, the charge must first be signed. This [procedure] was devised so that no one should readily leap to an accusation since he knows that his accusation will not be brought without risk to himself. 1. Everyone, therefore, specifies what charge he is bringing and, furthermore, that he will persevere with the charge until sentence. 2. The governor must not allow a man to be charged with the same offenses of which he has already been acquitted, and the deified Pius sent a rescript to Salvius Valens in these terms; but it must be considered whether this means that he cannot be charged by the same accuser, or not by anyone else as well. I should think that since matters which have been decided between others do not prejudice a third party, if the person who has now come forward as accuser be pursuing his own injury and shows that he had not known that an accusation had [previously] been brought by another, if there is good rea-

son he is to be allowed to be an accuser. 3. If, however, a man is prosecuted on one charge by a person who has [already] brought a false accusation against him on another, I think that he who has once been guilty of calumny should not readily be heard; although the deified Pius sent a rescript to Julius Candidus that the son of the accuser ought to be allowed to bring another accusation against a person accused by his father. 4. The same emperor wrote in a rescript that slaves should be punished in the place where they are accused of having committed their offense; and their master, if he wishes to defend them, cannot have them sent back into his own province, but must defend them where they committed the crime. 5. When sacrilege had been committed in one province and thereafter a lesser offense in another, the deified Pius sent a rescript to Pontius Proculus that after he had investigated the offense in his own province, he should send the man charged back to the province where he had committed sacrilege.

8 MACER, *Criminal Proceedings, book 2:* We shall understand who can bring an accusation if we know those who cannot. Thus, some may be debarred from making an accusation on grounds of sex or age, for example, a woman or a pupil; some because of their oath of allegiance, for example, those performing military service; some because [they hold] a magistracy or office acting under which they cannot with impunity be summoned to court; some because of their own offenses, such as the infamous; some because of their unsavory method of making money, such as those who have lodged two actions against two accused or take money to bring or not to bring an accusation; and some because of their status, such as freedmen against their patrons;

9 PAUL, *Views, book 5:* others because of suspicion of calumny, such as those who have been suborned and given false testimony;

10 HERMOGENIAN, *Epitome of Law, book 6:* some on account of poverty, such as those who possess less than fifty aurei.

11 MACER, *Criminal Proceedings, book 2:* All these, however, if they are pursuing a wrong done to themselves or are obtaining satisfaction for the death of those close to them, are not excluded from lodging an accusation. 1. To protect their own interests, children and freedmen are not to be prohibited to protect their own interests, from making a complaint of something done by their parents or patrons, as, for example, if they allege that they have been forcibly expelled from possession by them, that is, not in order to bring a charge of *vis* against them, but to recover possession. Again, a son is not indeed prohibited from making a complaint of the action of his mother, if his charge is that she has fraudulently substituted a child so that he has a co-heir; but he is not permitted to bring a charge against her under the *lex Cornelia* [*testamentaria*]. 2. Someone cannot accuse a person who has been accused by another; but if that person is removed from the list of those charged, whether because of a public or private amnesty or because of the withdrawal of the accuser, another person is not forbidden to accuse him.

12 VENULEIUS SATURNINUS, *Criminal Proceedings, book 2:* One may not accuse these persons: an imperial legate, that is, the governor of the province, in the opinion of Lentulus given in the consulship of Sulla and Trio; a legate of a provincial governor, at least in respect of an offense which he committed before he took up his office; also magistrates of the Roman people, or any person who has been absent on public service, as long as he is not absent for the purpose of evading the law. 1. Even men listed among those charged can make use of this privilege if they contend that, with the intervention of an amnesty, an action against them ought not to be renewed, in accordance with the letter of the deified Hadrian written to the consul Glabrio. 2. There is provision in the *lex Julia* on criminal proceedings that no one is to lodge simultaneous complaints against two accused, unless on account of outrages suffered by himself.

3. If a slave be cited as accused, the same procedures shall be observed as if he were a freeman in accordance with the *senatus consultum* given in the consulship of Cotta and Messala. 4. Slaves are liable to be charged under all laws except the *lex Julia de vi privata,* because those condemned under that law are punished by the confiscation of one third of their property, a penalty which does not apply to a slave. The same must be said of other laws under which a pecuniary penalty is inflicted, or even a capital penalty, such as relegation, which is not suitable as a penalty for a slave. Again, the *lex Pompeia* on parricide is not [applicable] since its first chapter covers those who have killed their parents, blood relations, or patrons; so far as the words go these do not apply to slaves, but when the essence of the case is the same, a similar punishment will be imposed on them also. Again, under the [*lex*] *Cornelia* on *injuria,* Cornelius Sulla was the authority [for saying] that a slave should not be accused; but a more severe penalty *extra ordinem* will threaten him.

13 MARCIAN, *Criminal Proceedings, book 1:* The deified Severus and Antoninus wrote in a rescript that for the public benefit a woman bringing an accusation relating to the corn dole is to be heard by the prefect of the corn dole. Infamous persons also are admitted as accusers without any doubt. Soldiers also, who are unable to bring other accusations, because they are on guard to keep the peace, should all the more be allowed to make this accusation. Even slaves are heard [when] bringing this charge.

14 PAUL, *Duties of Proconsul, book 2:* The senate has ruled that a person cannot be charged on account of the same crime under several statutes.

15 ULPIAN, *Edict, book 56:* A person, bringing an action against another by whose malicious intention it is alleged that men were brought together and financial loss caused, should not be compelled to bring a criminal charge to the exclusion of any civil action.

16 ULPIAN, *Duties of Consul, book 2:* In criminal proceedings, should there be a number of persons wishing to bring accusations against one man, the judge must choose the accuser, having taken account of the case and assessed the persons of the accusers, whether by reference to their status, their interest in the matter, their age, their morals, or any other good reason.

17 MODESTINUS, *Distinctions, book 6:* If a master defends his slave on a capital charge, he is required to pledge his appearance by giving bail.

18 MODESTINUS, *Replies, book 17:* When Titia threatened to prove that the will of her brother Gaius was forged and had not completed the formalities of the accusation within the time determined beforehand by the governor, the provincial governor laid down for a second time that she could not speak further about the forged will. Titia did not appeal against this decision, but said that [even] after the end of the time [allowed] she maintained the will was void. My question is whether Titia, who did not appeal against the decision of the governor, can thereafter return to the accusation of forgery. The response was that no evident grounds had been put forward [to show] why, against the weight of his decision, she should be given a hearing in her action for forgery.

19 CALLISTRATUS, *Judicial Examinations, book 5:* The deified brothers stated in a rescript that the heirs of accusers should not be compelled to pursue their charges. 1. Again, the deified Hadrian stated in a rescript that an accuser must not be compelled to charge more than one person.

20 MODESTINUS, *Punishments, book 2:* In offenses dealt with under criminal proceedings, the penalties of forfeiture of property apply against the heirs only if the case was defended and condemnation followed, with the exception of a trial for extortion or treason, which [penalties] may [in those instances] be enforced even against accused who have died with the case incomplete, so that their goods may be claimed for the imperial treasury. So, as the deified Severus and Antoninus wrote in a rescript that from the time that any person incurred any charge on these grounds, he could not dispose of any of his property or manumit [any of his slaves]. But with other offenses

the penalty can be imposed on the heir in the first place if and only if the accusation was lodged during the lifetime of the accused, even if condemnation did not follow.

21 PAPINIAN, *Replies, book 15:* Someone charged with a capital offense while the charge is yet unproved, is not barred from denouncing a case to the imperial treasury.

22 PAPINIAN, *Replies, book 16:* Someone charged [who comes from] another province is accused and condemned [in the province of] those in whose territory the crime is shown to have been committed. Our excellent emperors have written in general terms in their rescripts that this principle should also be observed in the case of soldiers.

3

CUSTODY AND PRODUCTION OF PERSONS CHARGED

1 ULPIAN, *Duties of Proconsul, book 2:* The proconsul normally determines the custody of accused persons, whether someone is to be lodged in prison, handed over to the military, entrusted to sureties, or even on his own recognizances. He normally does this by reference to the nature of the charge brought, the honorable status, or the great wealth, or the harmlessness, or the rank of the accused.

2 PAPINIAN, *Adulteries, book 1:* If a slave be accused on a capital charge, the statute on criminal proceedings provides that bail must be pledged for his appearance either by his master or by another; but if he is not defended, he is required to be thrown into a public prison so as to plead his case in chains. 1. There has, therefore, been frequent discussion of whether a master may subsequently be permitted to put up a surety and have his slave released. The doubt is increased by an edict of Domitian, which provided that the amnesties granted by *senatus consultum* should not apply to slaves of this kind. Indeed, the statute itself forbids a man's release before he has been tried. However, this interpretation is a very harsh one and excessively severe on a slave whose master was away or who because of shortage of means could not at that moment in time put up a surety. Nor can a slave properly be described as abandoned without a defense if he had no master at hand or if he had a master willing to defend him but lacking money. This [concession] may be allowed the more readily if it is not sought after a considerable lapse of time. 2. It is provided by *senatus consultum* that those arraigned to appear in one action are not to have a charge accepted against them in respect of another crime committed at an earlier date. The same principle is observed in private actions and in the case of men under *fideiussio*, unless by this a time-limited action would be put at risk.

3 ULPIAN, *Duties of Proconsul, book 7:* The deified Pius sent a rescript in Greek in reply to a letter from the inhabitants of Antioch to the effect that a person prepared to give sureties should not be put in chains, unless it was agreed that he had committed so serious a crime that he ought not to be entrusted to sureties nor to soldiers, but should suffer this same penalty of imprisonment before his punishment.

4 ULPIAN, *Duties of Proconsul, book 9:* Should anyone who has given surety for one charged fail to produce him, he suffers a money penalty. My own opinion, however, is that if he fails to produce him by connivance, he is also liable to condemnation *extra ordinem.* But if neither the obligation itself nor the governor's decree included a fixed sum, and no custom is declared which provides a set form, the governor shall lay down the quantity of money which must be paid into court.

5 VENULEIUS SATURNINUS, *Criminal Proceedings, book 2:* Should the accused confess, he shall be thrown into a public prison until sentence is passed on him.

6 MARCIAN, *Criminal Proceedings, book 2:* The deified Hadrian wrote to Julius Secundus in a rescript, and similar rescripts have been given elsewhere, that credence should certainly not be given to the letters of those who remitted [accused persons] to the governor as if they had already been condemned. The same point was laid down in the case of irenarchs because it was found that not all of them drafted their reports [of criminal interrogations] in good faith. 1. There is indeed extant a chapter of the rules which the deified Pius issued under his edict when he was governor of the province of Asia: that irenarchs, when they had arrested robbers, should question them about their associates and those who harbored them, include their interrogatories in letters, seal them, and send them for the attention of the magistrate. Therefore, those who are sent [to court] with a report [of their interrogation] must be given a hearing from the beginning although they were sent with documentary evidence or even brought in by the irenarchs. The deified Pius and other emperors have written in rescripts to this effect: that even in the case of those who are listed as wanted, if anyone appears to prosecute one [of these], they should not be treated as condemned but as though a charge were being laid afresh. Accordingly, when someone carries out an examination, the irenarch should be ordered to attend and to go through what he wrote. If he does this painstakingly and faithfully, he should be commended; if [he does it] with insufficient skill and not with thorough reasoning, [the judge] simply notes that the irenarch has rendered an inadequate report; but if [the judge] finds that his interrogation was in any way malicious, or that he reported things that were not said as if they had been said, he should impose an exemplary punishment, to prevent anyone else trying anything of the kind afterward.

7 MACER, *Duties of Governor, book 2:* It is customary for the governors of provinces in which an offense has been committed to write to their colleagues [in whose provinces] the perpetrators are alleged to live, requesting that they be returned along with those who are to prosecute them; this also is laid down in a number of rescripts.

8 PAUL, *Military Punishments, sole book:* If the officer in charge of a prison is bribed to keep someone in custody without chains, or has allowed a weapon or poison to be brought into the prison, he must be punished by the court; if he was ignorant of the fact, he should be removed from his post for negligence.

9 VENULEIUS SATURNINUS, *Duties of Proconsul, book 1:* In the case of soldiers, the custom is observed that if they commit any offense, they are handed over to the [commander] under whom they will be serving; and he who takes over an army has also the right of punishing private soldiers.

10 VENULEIUS SATURNINUS, *Duties of Proconsul, book 2:* To prevent anyone who has taken custody of a prisoner from releasing him without cause the rules provide as follows: "If you should establish that any persons kept in fetters have been released by the magistrates hastily and without cause, you shall order them to be bound and shall impose a fine on those who released them. For when magistrates are aware that if they lightly release men from bondage they will bring trouble on their own heads, they will not casually do so in the future."

11 CELSUS, *Digest, book 37:* There is no doubt that whatever be the province of a person produced from custody, he should be judicially examined by the governor of that province in which the action is taking place. 1. By some governors the practice is observed that when [the governor] has examined him and established [the truth], he should dispatch him, together with the written report [of the interrogation], to the governor of his province of origin; this should be done when there is good cause.

12 CALLISTRATUS, *Judicial Examinations, book 5:* If soldiers lose those placed in their custody, they themselves are at risk. For the deified Hadrian wrote a rescript to the legate Statilius Secundus that, whenever a prisoner escapes from military custody, an inquiry should be made into whether he did so because of excessive negligence on the part of the soldiers, or by accident, and whether one escaped out of a larger number, or several at once. Only then should those soldiers whose prisoners have escaped be put to death, if their fault is found very great; otherwise, [punishment] should be inflicted on them in accordance with the degree of their guilt. The same emperor also sent a rescript to Salvius, when legate of Aquitania, that punishment must be imposed on him who has set a prisoner at large or has knowingly kept him in such a way that the prisoner is able to escape; but if it

occurs because of the drunkenness or sloth of the guard, the guard should be corporally punished and transferred to inferior military duties. If, however, he loses [his prisoner] by pure mischance, no punishment should be imposed on him. 1. My view is that if a person escapes from civilian custody, an investigation must be made similar to that which I have mentioned is to be undertaken in the case of soldiers.

13 CALLISTRATUS, *Judicial Examinations, book 6:* On those who, after being lodged in prison, conspire to smash their fetters and break out of jail, punishment is to be imposed over and beyond that due for the offense for which they were lodged as accused; and even though they be found innocent of the charge for which they were flung in jail, yet they should [still] be punished; but those who exposed their conspiracy should receive a lighter penalty.

14 HERENNIUS MODESTINUS, *Punishments, book 4:* Custody of a prisoner should not lightly be given to an inexperienced person; for if the prisoner be lost, the blame rests upon the person who entrusted [the prisoner] to him. 1. The prisoner should be handed over, not to a single person but to two. 2. Those who lose a prisoner by negligence, according to the degree of their fault, are corporally punished or transferred to another branch of the service; but if it was an unimportant prisoner, they are corporally punished and restored [to their rank]. If someone lets a prisoner go out of pity, he is transferred to another branch of the service; but anyone involved in dishonest dealings over the release of a prisoner suffers the capital penalty or is transferred to the lowest rank in the service. Occasionally, pardon is given; thus, when a prisoner had made his escape along with one of the guards, the other guard was pardoned. 3. However, if a prisoner kills himself or throws himself down from a height, this shall be held to be the soldier's fault, that is, he shall be corporally punished. 4. If the guard himself kills his prisoner, he is guilty of homicide. 5. For this reason, if the prisoner is said to have died by accident, this must be proved by the evidence of witnesses, and thus a pardon will be given. 6. Furthermore, it is customary that where a prisoner has escaped by the fault [of his guard], if it is important that he be caught, the soldier is given, on cause shown, time to look for him, and another soldier is attached to him. 7. But Saturninus says approvingly that if anyone loses a runaway slave who is due to be returned to his master, he shall, if he has the means, be ordered to pay the master the price [of the slave].

4

LEX JULIA ON TREASON[1]

1 ULPIAN, *Duties of Proconsul, book 7:* Closest to sacrilege is that crime which is called treason. 1. The crime of treason is that which is committed against the Roman people or against their safety. He is liable, by whose agency a plan is formed with malicious intent to kill hostages without the command of the emperor; or that men armed with weapons or stones should be, or should assemble, within the city against the interests of the state, or should occupy places or temples; or that there should be an assembly or gathering or that men should be called together for seditious purposes; or by whose agency a plan is formed with malicious intent to kill any magistrate of the Roman people, or anyone holding *imperium* or power; or that anyone should bear arms against the state; or who sends a messenger or letters to the enemies of the Roman people, or gives them a password, or does anything with malicious intent whereby the enemies of the Roman people may be helped with his counsel against the state; or who persuades or incites troops to make a sedition or tumult against the state;

2 ULPIAN, *Disputations, book 8:* or who has failed to relinquish his province although his successor has arrived; or who has deserted the army, or, as a private citizen, has fled to the enemy; or has knowingly written or dictated a falsehood onto the public records; for this also is set out in the first chapter of the statute on treason.

3 MARCIAN, *Institutes, book 14:* The *Law of the Twelve Tables* commands capital punishment for the man who stirs up the enemy or hands a Roman citizen over to them. But the *lex Julia* on treason makes him liable who injures the public *majestas*, such as he who sur-

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1. *Majestas* is translated regularly as treason, except where it is being contrasted with *perduellio* or means majesty or lèse-majesté.

renders in war or recklessly yields a citadel or camp. Under the same law who, without the command of the emperor, wages war or raises a levy or prepares an army; or who, though he has been superseded in his province, has not handed his military command over to his successor; or who has abandoned his *imperium* or an army of the Roman people; or who, being a private citizen, knowingly and with malicious intent acts as though holding office or magistracy; or who brings about the doing of any of the above;

4 SCAEVOLA, *Rules, book 4:* or he by whose malicious intent a person is induced to take an oath to act against the state; or by whose malicious intent an army of the Roman people is led into an ambush or betrayed to the enemy; or whose malicious action is alleged to have prevented enemies falling into the power of the Roman people; or by whose agency with malicious intent the enemies of the Roman people have been assisted with provisions, arms, weapons, horses, money, or any other thing; or who so acts that allies of the Roman people become their enemies; or by whose malicious intent it is brought about that the king of a foreign nation fails to make submission to the Roman people; or by whose agency with malicious intent it is brought about that hostages, money, or cattle are handed over to the enemies of the Roman people against the interests of the state; also the man who lets go someone charged and found guilty in a [treason] trial and for this reason cast into prison. 1. The senate cleared of this charge a man who had melted down rejected statues of the emperor.

5 MARCIAN, *Rules, book 5:* He who has restored imperial statues which have fallen into disrepair with age does not incur a charge of treason. 1. Nor has someone committed the offense of treason if he happened to hit a statue [of an emperor] with a chance-thrown stone, as Severus and Antoninus wrote in a rescript to Julius Cassianus. 2. The same [emperors] wrote in a rescript to Pontius that there did not seem to be lèse-majesté in selling likenesses of Caesar which had not yet been consecrated.

6 VENULEIUS SATURNINUS, *Criminal Proceedings, book 2:* Persons are liable under the *lex Julia* on treason who melt down statues or likenesses of the emperor which are already consecrated, or who commit anything of the same kind.

7 MODESTINUS, *Encyclopaedia, book 12:* The infamous, who do not have the right of accusation, are nevertheless undoubtedly permitted this accusation. 1. Soldiers also, who cannot bring other kinds of actions; for those who are on guard to keep the peace should more and more be permitted this accusation. 2. Slaves also who bring [this] accusation are given a hearing, even against their masters, as are freedmen against their patrons. 3. But this charge should not be treated by judges as an

opportunity for showing their reverence for the imperial majesty, but as a matter of fact; for the nature of the person must be considered; could he have done it, had he done or devised anything beforehand, and was he in his right mind? Nor should a slip of the tongue readily bring a man to punishment; for although thoughtless persons may deserve punishment, nevertheless, they should be pardoned as not of sound mind if their crime was not of such a kind that it derives from the actual wording of the statute or merits exemplary punishment. 4. The offense of treason in an action such as the violation of statues or images is very much aggravated in the case of a soldier.

8 PAPINIAN, *Replies, book 13:* Women also are given a hearing in questions [of offenses] against the *majestas* [of the Roman people]. It was indeed the woman Fulvia who revealed the conspiracy of Sergius Catiline and gave information to the consul M. Tullius [Cicero].

9 HERMOGENIAN, *Epitome of Law, book 5:* The deified Severus decreed that the property of freedmen of those condemned on a charge of treason should be saved for the children of the condemned, and should be claimed for the imperial treasury only if there were no surviving children of the condemned man.

10 HERMOGENIAN, *Epitome of Law, book 6:* He by whose help and counsel, given with malicious intent, a province or a *civitas* has been betrayed to the enemy can be accused of the offense of treason.

11 ULPIAN, *Disputations, book 8:* He who dies while under accusation dies with his status unimpaired; for the charge is extinguished by death. Unless perchance he has been charged with treason; for with this offense his inheritance is claimed by the imperial treasury, unless he is cleared by his successors. Clearly, not everyone charged with treason under the *lex Julia* is on the same footing, but he who is charged with *perduellio*, animated by a hostile spirit against the state or the emperor [is liable even after death]; he who is charged under the *lex Julia* on treason on other grounds is cleared of the charge on his death.

5

LEX JULIA ON PUNISHING ADULTERIES

1 ULPIAN, *Adulteries, book 1:* This law was passed by the deified Augustus.

2 ULPIAN, *Disputations, book 8:* In the *lex Julia* it is laid down that anyone who has to begin with the male adulterer because the woman has married [again] before the notification [of intended prosecution], cannot arrive at [an action against] the woman unless he has completed [the action against] the man. But no one is regarded as having completed an action unless he has obtained a condemnation. 1. This rule deservedly bars someone making an accusation by the right of a husband if he is alleged to have betrayed the [intention of the] statute on the grounds that, having begun on an accusation of adultery, he has dropped it. 2. The crime of *lenocinium* is laid down by the *lex Julia* on adultery, since a penalty is appointed by the statute for the husband who acquires anything from the adultery of his wife and also for him who keeps her after she has been caught in adultery. 3. But he who permits his wife to offend and despises his marriage and who is not angry at the defilement is not inflicted with the punishment for adultery. 4. A person who says he [committed adultery] by the *lenocinium* of the husband is indeed seeking to extenuate his offense, but a set-off of this kind is not admitted. And so if a man accused of adultery wishes to have the husband accused of *lenocinium*, he shall not be given a hearing once he has himself been accused. 5. If in a criminal trial a husband makes an accusation against his wife, should an allegation of *lenocinium* deny the husband his accusation? I would think it

does not; the *lenocinium* of a husband therefore hampers him but does not excuse his wife. 6. From this it can be asked whether he who hears a case of adultery can proceed against the husband for *lenocinium.* And I think he can. For Claudius Gorgus, a man of senatorial rank, who accused his wife, was condemned for *lenocinium* by the deified Severus without any accuser when he was discovered to have kept his wife caught in adultery. 7. But a third party who raises [the issue of] *lenocinium* after he has been accused shall in no way alleviate his own case, nor shall he make the husband liable to a penalty. 8. If the husband and the wife's father come simultaneously to make an accusation, who should be given preference? The better view is that the husband should be preferred; for it is to be believed that he will carry through the accusation with a more intimate anger and a greater grief; so much so that the same is to be said even if the father was the first to come and lodge forms of indictment, provided that the husband was not negligent or delaying, but preparing an accusation and furnishing and providing proofs so that the adultery might be the more easily proved to the judges. 9. But whenever others, who can make an accusation after the husband and the father, hasten forward with an accusation, it is expressly stated in the statute that he who has cognizance of the matter may determine [who is] the proper accuser.

3 ULPIAN, *Adulterers, book 2:* Unless, therefore, the father either proves that the husband is infamous or makes clear that he is rather colluding with his wife than accusing her sincerely, he shall be given place after the husband.

4 ULPIAN, *Disputations, book 8:* If a husband takes precedence and begins an accusation, time [to make an accusation] does not run against the father so as to prevent his bringing one, but until one [of them] first takes action, time runs against both; but where the husband is the first to take action, the remaining time does not run against him who cannot accuse. The same can be said of him who begins either with the adulterer or with the adulteress; for time ceases to run for the accuser against the party, against whom he is not initiating the action. This is the rule for husbands and fathers. 1. But for third parties who can make an accusation the power to accuse is granted [only] after the husband and the father; for after the sixty-day period, four months are allowed to third parties, and these four are *menses utiles.* 2. If a third party has previously instituted an accusation, may an accusation be allowed to a late-coming husband? I think it is better that in this case also the husband should be heard if he was not forestalled through his own negligence. Therefore, even if an accusation has been made by a third party and the woman acquitted, one must still allow the husband to bring the accusation afresh if he can prove good reasons for his being prevented from initiating the accusation.

5 JULIAN, *Digest, book 86:* There is no doubt that a woman married to me can be charged with an adultery committed during a former marriage, since it is explicitly laid down in the *lex Julia* on the punishment of adulteries that if indeed the woman whose adultery is at issue is a widow, the accuser may have a free choice as to whether he prefers to accuse the adulterer or the adulteress first; but if she is married [again] that he should first complete his action against the male adulterer, then the woman.

6 PAPINIAN, *Adulterers, book 1:* The *lex Julia* applies only between free persons who have suffered adultery or *stuprum.* But as far as female slaves are concerned, an action under the *lex Aquilia* will readily apply and that for *injuria* is also competent, nor must the praetorian action for the corruption of a slave be refused; nor shall someone accused of this kind of offense be spared because of the many actions [possible against him]. 1. The law refers to *stuprum* and adultery indiscriminately and with rather a misuse of terms. But properly speaking adultery is committed with a married woman, the name being derived from children conceived by another (*alter*); *stuprum,* however, is committed against a virgin or a widow; the Greeks call it corruption. 2. A husband who is a son-in-power is not distinguished in this law from one who is *sui juris.* The deified Hadrian wrote in a rescript to Rosianus Geminus that a son can charge someone under this law even against the will of his father. 3. Although a husband may [already] have charged two persons with some other offense, he can by his

husband's right accuse a third, since the case [of adultery] is not counted with the others.

7 MARCIAN, *Institutes, book 10:* If a man has married his pupil in contravention of the *senatus consultum* this is not a marriage, and he can be accused of adultery if he was tutor or curator and married, before she was twenty-six years old, a woman not betrothed to him by her father nor destined [as his wife] nor [so] named in her father's will.

8 (7,1) PAPINIAN, *Adulteries, book 2:* MARCIAN notes: A joint charge of incest can be raised against two people at the same time.

9 (8) PAPINIAN, *Adulterers, book 2:* He who knowingly makes available his house for the commission of *stuprum* or adultery with the *mater familias* of another or for homosexual relations with a man, or who makes a profit from the adultery of his own wife, is punished as an adulterer, no matter what his status. 1. It is obvious that by the term "house" any sort of residence is meant.

10 (9) ULPIAN, *Adulteries, book 4:* And if anyone has made available the house of a friend, he is liable. 1. And, indeed, if anyone has provided for the commission of *stuprum* out of doors or in the baths, he ought to be covered [by the statute]. 2. And if men have been accustomed to meet at a certain house to plan an adultery even if nothing was committed at that place, nevertheless the [occupier] seems to have made available his house for the commission of *stuprum* or adultery, because without that specific discussion the adultery would not have been committed.

11 (10) PAPINIAN, *Adulteries, book 2: Mater familias* means not only a married woman but also a widow. 1. Women also are liable under this chapter of the statute insofar as they have made available their house or have accepted something for a blatant *stuprum.* 2. A woman who to avoid the penalty of adultery has become a brothel-keeper or who has hired herself out on the stage can be accused of and condemned for adultery according to the *senatus consultum.*

12 (11) PAPINIAN, *Adulterers, sole book:* A soldier who has come to an agreement with his wife's lover should be released from his oath and deported. 1. It is more correctly said that a soldier who has the daughter of his sister as his concubine is liable to the penalty for adultery even though there is no marriage. 2. A woman who has been listed among those charged with adultery cannot be defended in her absence. 3. After a father-in-law had testified, in a formal complaint presented to the provincial governor, that he would accuse his daughter-in-law of adultery, he preferred to abandon the accusation and rather to seek profit from the dowry. Do you think this kind of scheme should be allowed? The reply was: [It would be] an appalling precedent [if] he who had begun to bring an accusation against his own daughter-in-law afterward preferred to cease [prosecution], being content to retain the profit from the dowry although it was the woman's fault that the marriage had broken up; therefore, it is not unreasonable to refuse him [an action] for the recovery of the dowry, since he did not blush to prefer the advantage of a dowry to the defense of his own house. 4. It is clear that a man charged with adultery can be prosecuted within the five years following the date of the offense being committed, even though the woman is dead. 5. A certain man was wishing to accuse a woman of adultery and made application that the days might not be counted against him which he had spent in custody; while I would allow this, someone came forward to gainsay me. I ask you to write to me pretty quickly whether you would accept his view. The reply was: Both the words and the spirit of the statute support your view which held that *dies utiles* should be reckoned against the accuser, that is, those on which he was able to complete the formalities of an accusation. Therefore, without doubt your view, that the days during which a person was in custody are held to be outside the reckoning of *dies utiles,* ought not to have been contested. 6. It is certain that the sixty days which are reckoned as *dies utiles* to an accusing husband are counted including holidays, provided the accuser had the opportunity of approaching the governor, since a document laying the accusation can be handed in outside the court. But if [the husband] has lost this privilege he is not

prevented from laying his complaint before a judge within a further four months. 7. Could a man make an accusation with the right of a husband against a woman who, after being betrothed to him, had been given in marriage to another by her father? The reply was: I think it would be a novelty to create an accuser of this kind, who seeks to lay a charge of adultery on account of the mere fact that a girl formerly betrothed to him has been given in marriage to another by her father. 8. A woman who is after the death of her husband alleged guilty of adultery, 9. wishes to obtain an adjournment from her accuser for the sake of her infant son; ought she to be heard? I replied: The woman does not seem to me to have recourse to a justified defense if she puts forward the age of her son in order to escape a legitimate accusation; for anyway the charge of adultery which is laid against the woman does not prejudice the boy, since it is possible for her to be an adulteress and for the boy [still] to have had the dead man as his father. 10. I wish to allege guilty of adultery a woman who has continued in her marriage after the commission of the offense, but this is denied me. Is this a correct reply? The reply was: You ought not to have been ignorant of the fact that, as long as the marriage in which the adultery is said to have been committed endures, the woman cannot be charged with adultery; neither can the male adulterer be accused for the time being. 11. Although a woman may be alleged to have married a man who has fallen under suspicion of adultery [with her], she cannot be accused before he is convicted of adultery; otherwise, perhaps [first] husbands will very often resort to this expedient when they wish to break up a harmonious second marriage by saying that the woman had contracted marriage with her adulterous [lover]. 12. A woman, after she had heard that her absent husband had died, married another man; not long after, her husband returned. What steps should be taken against that woman? The reply was that the question raised was not so much one of law as of fact; for if a long time had elapsed without evidence of any *stuprum* [on her part] and she, led by false reports [into believing] that she was free from the earlier bond, contracted a lawful second marriage, the likelihood is that she was [genuinely] deceived, and there can appear to be nothing deserving punishment. But if the supposed death of her husband shall be proved to have provided an excuse for getting married, [then] since [her] action is offensive to chastity, she ought to be punished in accordance with the nature of the offense committed. 13. I have married a woman charged with adultery; I have divorced her as soon as she was convicted. Am I regarded as having provided the grounds for the divorce? The reply was: Since, in accordance with the *lex Julia*, you are forbidden to keep a wife of this kind, it is clear that you are not to be regarded as having provided the grounds for the divorce. For this reason then, the question of right shall be treated as though the divorce had been brought about because of the fault of the woman.

13 (12) ULPIAN, *Adulteries, book 1:* The words of the statute "let no one hereafter knowingly and with malicious intent commit *stuprum* or adultery" apply both to him who counsels *stuprum* or adultery and to him who brings it about.

14 (13) ULPIAN, *Adulterers, book 2:* If a woman caught in adultery is not a wife but was a concubine [her man] cannot accuse her with a husband's right for she was not a wife, but he is not forbidden to institute an accusation by the right of a third party, provided that she was someone, as, for example, one who was her patron's concubine, who did not lose the name of matron by giving herself in concubinage. 1. Clearly, a husband can bring an accusation whether his wife is party to a *jus civile* or a *jus gentium* marriage; for, as Sextus Caecilius says, this law applies to all marriages and he cites that line from Homer: For not only, it runs, the sons of Atreus love their wives. "Not alone of articulate men do the sons of Atreus love their wives." 2. Indeed, a husband can vindicate his right for adultery in a wife who is a prostitute even though, were she a widow, *stuprum* might be committed with her without penalty. 3. The deified Severus and Antoninus wrote in a rescript that this same [offense] is punishable even in the case of a fiancée, because it is not permissible to violate either a marriage, of whatever sort, nor [yet] an expectation of marriage. 4. If, however, she should be a woman with whom incest has been committed or one who, though she has the disposi-

tion to be a wife, is not able to be a wife [through some impediment], it must be stated that she cannot be accused by a husband's right but she can by the right of a third party. 5. A judge [in a case] of adultery ought to keep before his eyes and to inquire into whether the husband by his own chaste life was also setting his wife an example of cultivating sound morals; for it appears the height of injustice that a husband should demand of his wife a purity which he does not show himself; this is something which can condemn the husband also, that the pair of them did not come to an agreement for the balancing out of their mutual offenses. 6. Should a person wish to accuse his own wife and state that she has committed adultery before she married him, he cannot institute an accusation under his husband's right because she did not commit the adultery when she was married to him. This can also be said of a concubine whom a man has subsequently married, or of a daughter-in-power whose father has subsequently consented to her union. 7. If anyone should prove clearly that his wife committed adultery when she was in enemy hands, it will be said as a concession that he can make the accusation by a husband's right; but the husband will be able to claim [satisfaction] for adultery only if she was not subjected to violence by the enemy; if, however, a woman is subject to violence, there are no grounds for her to be condemned for adultery or *stuprum.* 8. If a girl below the age of twelve who has formally been given in marriage commits adultery and not long after at [her husband's] house passes that age and begins to be a wife, she cannot, as a married woman, be accused under a husband's right on account of the adultery which she committed before [she came of] age, but she can be accused as if betrothed, under the rescript of the deified Severus which is set out above. 9. If a [wife] has been repudiated and then taken back [by her husband], not as it were within the span of the same marriage but as though another had taken place in between, we have to see whether she can be accused of the offense which she committed in the previous marriage. I think that she cannot; for [the husband] canceled the offenses of the previous marriage by marrying her again. 10. The same has to be said if someone should wish to accuse of *stuprum* the woman whom he subsequently married; for it is too late for him to impugn the [woman's] morals which he has endorsed by marrying her.

15 (14) SCAEVOLA, *Rules, book 4:* He by whose aid and counsel, with malicious intent, it is brought about that a man or woman caught in adultery should buy themselves off with money or any other agreement, is condemned to the same punishment as is laid down for those condemned on a charge of *lenocinium.* 1. If a husband, in order to blacken his wife's good name, suborns an adulterer so that he himself can catch [them in the act], both husband and wife are liable to a charge of adultery under the *senatus consultum* made on this subject. 2. It is permitted to a husband first of all, or [after him] to a father who has a daughter-in-power, to make an accusation within sixty days of the divorce, and no one else is granted the power of bringing an action in that period; outside those days, regard is not paid to the wishes of either of them. 3. Those who bring accusations under a husband's right do not thereby avoid the risk of calumny.

16 (15) ULPIAN, *Adulteries, book 2:* If a husband should be holding a magistracy, it is possible for the [woman's] father to take precedence over him [in lodging an accusation]; not but what he should not. Pomponius also thinks that it should be stated that so long as the husband is holding the magistracy, the father's right to bring an accusation should also be held up, to prevent the husband's right, which is equal with that [of the father], being taken away from him; therefore, the father's sixty days will not run since he cannot bring an accusation. 1. In chapter seven of the *lex Julia* on adulteries it is provided as follows: "No one is to put on the list of persons charged someone who, without [the intention of] evasion, is absent at the time on public business"; for it did not appear just that a person absent on public business should be listed among those charged so long as he is working for the state. 2. The words "without [the intention of] evasion" are a necessary addition; but if someone has arranged to be absent on public business for the purpose of avoiding a charge, his scheme is to avail him nothing. 3. If, however, someone is physically present and yet is [normally] treated

as if he were absent (as for example someone who is serving in the *vigiles* or the urban cohorts), it should be stated that he can be accused; for he does not have to take [undue] pains to put in an appearance. 4. It is also to be stated as a general rule that the absence is excused of those persons only who are absent on state business in a province other than the one in which they are accused. In the same way, if a person commits adultery in the province in which he holds office, he can be accused [there], unless his status is such that it is not subject to the governor's jurisdiction. 5. If the husband and the father state before the sixty days are up that they are not going to bring an accusation, does time immediately begin to run for a third party? Pomponius was the first to think that a third party could be allowed to bring an accusation immediately they state that they are not [bringing one]. I think that one must agree with him; for it can be said with even greater weight that a person who has stated that he will not be bringing an action ought not thereafter to be given a hearing. 6. The *lex Julia* on adulteries expressly prohibits certain persons from bringing an accusation of adultery, such as someone below the age of twenty-five; for a person who is not yet of full age is not seen as a suitable accuser. This is true only if he is not pursuing an injury to his own marriage; but if he wishes to avenge his own marriage, although he may be proceeding to [make] the accusation by a third party's right, yet he is to be given a hearing; for no such limitation should be placed in the way of someone avenging his own injury. True, if he was led by youthful heedlessness, or fired by a young man's passion, into leaping into an accusation, the penalty for calumny will not readily be invoked against him as accuser. We take someone who is in the twenty-fifth year of his age as being below the age of twenty-five. 7. Those limitations which are customarily brought as objections to persons bringing accusations of adultery must as a matter of course be dealt with before anyone can be included among the persons charged; but when someone has once been included, he cannot plead a limitation. 8. If a woman continues in her widowhood, it is at the discretion of the accuser whether he wishes to begin with the male or the female party to the adultery. 9. If anyone has accused an adulterer and an adulteress at the same time, he achieves nothing and can, as if he had not accused either of them, make a fresh start with which one he wishes, because he has not achieved anything by his first accusation.

17 (16) ULPIAN, *Adulteries, book 1:* A man who has sent a repudiation to his wife can subsequently accuse her to prevent her marrying Seius and, if he accuses her, [can] begin with her.

18 (17) ULPIAN, *Lex Julia on Adulteries, book 2:* How do we take it that an accusation has been made, to a judge or just simply? I myself think that it is enough if someone intimates that he is going to bring a prosecution for adultery, even if he has not done so before a judge. 1. What, then, if he has not in fact made an [open] accusation but submitted documents of accusation before [the woman in question] married and she, although she had learned of this, married [anyway], or even [married] in ignorance [of the accusation]? I think that notification [of an accusation] does not seem to be served on her; and for that reason it is not possible for the accuser to begin with her. 2. What, then, if he has accused her only to prevent her marrying, but has failed to add the grounds; is she not to be regarded as having rightfully married? It is better, however, to follow [the principle] that his accusation of her seems to reserve to the accuser, who has brought the charge, the right of choice. By all means, therefore, if [the accuser] has made a reference to the crime of adultery in his accusation, even if he has not indicated [the evidence] to the judge, we think with better reason that the woman can be accused, just as if a [proper] accusation had gone beforehand. 3. But what if there is specifically included in the accusation the person with whom she committed adultery, and then he wishes to accuse her [of adultery] with another person? The better view is that he ought not to be given a hearing; for he is not putting forward the charge which he announced. 4. Again, if a person has issued a notification by means of a procurator, I think that he can, if he wishes, institute the accusation, and that the procurator's notification is sufficient. 5. Therefore, also if he makes the notification by means of agents, that is, [where] a master makes the notification by means of a slave, his notification will be ratified. 6. Can one person accuse the adulteress and another the adulterer, so that, although they cannot both be accused simultaneously by the same person, they can separately [be accused] by different persons? It is, however, consistent to agree

that different accusers can be allowed, with the proviso that if the woman marries before the notification, she cannot be accused first. Therefore, the woman will await the passing of sentence on the male adulterer; if he is acquitted, the woman will win her case through him and cannot be accused further; if he is condemned, the woman is not thereby condemned but will conduct her own action so that perhaps she may be able to win it by favor or by the justice [of her case] or by the help of the statute. For what if the male adulterer, after having been beset with enmities or incriminated before the governor by false evidence and suborned witnesses, was unwilling or unable to appeal, while the woman, having drawn a principled judge, is going to make a defense of her modesty? 7. But if, before being condemned

19 (18) Macer, *Criminal Proceedings, book 1:* or before the action against him is begun,

20 (19) Ulpian, *Lex Julia on Adulterers, book 2:* the male adulterer dies, it is also laid down that on his death the woman can be accused without bar to the accusation. 1. If, however, it was not death but the penalty for some other offense that removed the man charged, we still say that it is possible to come at the woman. 2. If, at the time when he was charged, the female adulterer was not married, but when he is acquitted she is found to be married, it must be stated that even after the male adulterer's acquittal, it is possible for her to be accused, because, at the time he was charged with adultery, she was not married. 3. A married woman cannot be accused, not only [not] by the person who accused the male adulterer unsuccessfully but also not by anyone else, if the male adulterer was acquitted. In the same way, if by collusion [the accuser] comes to an agreement with the male adulterer and [the latter] is acquitted, he has given the married woman immunity from all [accusers]. Clearly, if she ceases to be married, she can be accused; for the statute does not protect anyone other than a married woman for as long as she is married.

21 (20) Papinian, *Adulteries, book 1:* A father is granted the right of killing an adulterer along with a daughter whom he has in power; no other [class of] father may lawfully do this, including a father who is a son-in-power.

22 (21) Ulpian, *Adulterers, book 1:* (Thus, it may happen that neither a father nor a grandfather may be able to kill), nor is this unreasonable; for a man does not seem to have [anyone] in his own power if he does not have power over himself.

23 (22) Papinian, *Adulterers, book 1:* In this statute, a natural is not distinguished from an adoptive father. 1. A father does not have a special right of accusation over a daughter who is a widow. 2. The right to kill is granted to the father in his own house, even if his daughter does not live there, or in the house of his son-in-law; the term "house" is to be taken as meaning "domicile," as in the *lex Cornelia* on *injuria*. 3. However, a person who has the power to kill an adulterer is all the more able lawfully to inflict rough treatment on him. 4. The reason why it is the father not the husband who is allowed to kill the woman and any adulterer [caught with her] is that, for the most part, the concern for family duty implicit in the title of father takes counsel for his children; but the heat and impetuosity of a husband [too] readily jumping to a decision should be restrained.

24 (23) Ulpian, *Adulteries, book 1:* The words of the statute "shall have caught the adulterer in his daughter" do not appear to be otiose; for the intention was that this power should be available to the father if and only if he should catch his daughter actually engaged in the crime of adultery. Labeo also approves [this interpretation], and Pomponius has written that a person caught in the actual act of love is killed. This also is what Solon and Draco say: ἐν ἔργῳ "in the act". 1. It is enough for the father if he has [his daughter] in power at the time when he kills her, not at that when he gave her in marriage; suppose here that she was subsequently taken back into power. 2. The reason why the father is not allowed to kill his daughter wherever he catches her, but only in his own house or in that of his son-in-law, is said to be that the legislator thought it a more serious outrage for her to dare to bring an adulterer into the house of her father or her husband. 3. But if the father should live elsewhere and yet has another house in which he does not live, then, if his daughter is caught [in the house] where he does not live, he cannot kill her. 4. The words of the statute "may kill his daughter without delay" are to be taken in this sense; that he may not, after killing the male adulterer today, spare his daughter and then kill her some days later, or vice versa; for he must kill both of them almost with the one blow and the one onset, possessed by an equal anger against both. If, however, he has failed to achieve this and

his daughter makes her escape while he is killing the male adulterer, only to be caught some hours later by her father who has been pursuing her, he will be regarded as having killed [her] without delay.

25 (24) MACER, *Criminal Proceedings, book 1:* A husband also is permitted to kill his wife's adulterer, but not, as the father is, whoever it may be; for it is provided by this statute that a husband is permitted to kill a man whom he catches in adultery with his wife in his own house (not also [in that] of his father-in-law) if the [paramour] is a pimp or if he was previously an actor or performed on the stage as a dancer or singer or if he has been condemned in criminal proceedings and is not yet restored to his former status, or if he is a freedman of the husband or wife or of the father, mother, son, or daughter of either of them (and it is of no consequence whether he was the sole property of one of them or was owned jointly with someone else) or if he is a slave. 1. It is also laid down that a husband who kills any of these is to divorce his wife without delay. 2. But it has been stated by the majority of [jurists] that it does not matter whether the husband is *sui juris* or a son-in-power. 3. The question is asked, as regards both of them [father and husband], in terms of the sense of the statute: Is the father permitted to kill a magistrate? Again, if the daughter is of bad reputation or the wife was married contrary to the statutes, do the father and the husband nonetheless have their right [to kill her]? And what if the father or the husband is a pimp or branded with some disgrace? It will be more correct to say that [only] those who can bring an accusation under a father's or husband's right have the right to kill.

26 (25) ULPIAN, *Lex Julia on Adulterers, book 2:* In the fifth chapter of the *lex Julia,* the following is laid down: that a husband, who has caught in his wife an adulterer whom he either does not wish or is not permitted to kill, may lawfully and with immunity detain him for a continuous period not exceeding twenty hours, by day and by night, for the purpose of testifying to the matter. 1. My own view is that what is expressly laid down for a husband should also apply to a father. 2. Even if a husband apprehends [the adulterer] elsewhere than in his own house, he can detain him. 3. But once let go, the adulterer cannot be brought back. 4. What, therefore, if he escapes; can he be brought back and guarded for twenty hours? And I think it may rightly be said that once brought back, he can be kept for the purpose of testifying to the matter. 5. The addition of "for the purpose of testifying to the matter" has this effect, that it may lead witnesses to be available to give testimony for the accuser that the man charged was taken in adultery.

27 (26) ULPIAN, *Disputations, book 3:* So long as her marriage lasts, a wife cannot be accused of adultery by those persons, apart from her husband, who are allowed to make an accusation; for no third party should upset and disturb a wife approved by her husband and a peaceful marriage, unless he shall first have accused the husband of *lenocinium.* 1. But it is competent for an accusation abandoned by the husband to be revived by another.

28 (27) ULPIAN, *Adulteries, book 3:* If an accuser demands that an interrogation [under torture] be made of a slave accused of adultery, whether he himself has wished to be present or not, the judges [shall] order that slave to be valued, and when they have valued him, they shall order the man who has named the slave in his accusation to convey to him to whom this matter pertains as much money [as the slave is worth] and as much again. 1. But let us consider to whom that penalty should be paid, because the statute named him as "to whom this matter pertains." Therefore, we shall rightly state that a bona fide buyer, although he bought from one who was not the owner, is the man "to whom this matter pertains." 2. And we all the more agree that the pledge creditor is also in the same position; for he indeed had an interest that the slave should not be put to the question. 3. And if someone else has a usufruct in a slave, the estimated value should be divided between him and the owner. 4. If a slave is common to several masters, then by all means must the estimated value be divided between them. 5. If a freeman, while he is thought a slave, has been tortured because he himself did not know his own status, Caecilius prefers to grant him an *actio utilis* against the man who assailed him by calumny, so that his calumny in bringing a freeman to torture as though he were a slave should not go unpunished. 6. The statute orders that the male or female slaves of a man or woman who is the subject of a criminal investigation, or of the parent of either of them, should be put to the torture, if those slaves were given by the parents for the use of [the accused]. However, the deified

Hadrian wrote in a rescript to Cornelius Latinianus that torture may [also] be applied to slaves outside the household. 7. There are ordered to be present at the interrogation the accused person, male or female, their patrons, and the person bringing the accusation, and the patrons are granted the opportunity of putting questions. 8. The prevailing view is that interrogation under torture may also be applied to a slave in whom the person charged had a usufruct; for granted that he was not "his" slave, he still appears to have been in his service; and what is relevant to the interrogation is not the issue of ownership but that of employment. 9. Therefore, if someone else's slave is serving the person charged in good faith, one will agree that he can be interrogated under torture. 10. Again, if there should be a slave to whom freedom is due by a *fideicommissum* or is hoped for by disposition [in a will], the prevailing view is that he can [still] be tortured. 11. The statute orders that those men to whom torture has been applied in this manner should [thereafter] be *publici servi*; similarly, with [a slave] in common ownership we confiscate one share; with a slave in single ownership, of whom a third party has a usufruct, [we confiscate] the bare ownership; while as regards one in whom the person charged had only a usufruct, the prevailing view is that the taking of the usufruct should begin to belong to the state; we shall definitely not confiscate a slave belonging to a third party. The reason then for making the slaves public property is so that they may speak the truth without any intimidation and may not, fearing that they are going to return to the power of those accused, be obdurate under torture. 12. They are not, though, confiscated until the torture has been applied to them. 13. But even if they deny [the charge], they are nonetheless confiscated; for the reason is still the same, that they should not, while hoping to return to the power of their [former] masters, persist in telling lies in the hope that a reward will be bestowed on them. 14. The accuser's slaves also, if torture has been applied to them, are confiscated; for it is right that his slaves also leave his ownership, lest they should tell lies. The slaves of third parties, however, do not have anyone whom they can gratify [by lying, and are therefore not confiscated]. 15. If the person charged, male or female, is acquitted, the intention of the statute was that his or her loss should be assessed by the judges; and if [the slaves] have died, [it shall be established] how much money they were worth before the torture, or if they are alive how much money the damage done to them costs or [how much money] the gain [from them] would have been. 16. Attention should be paid to what is provided in chapter nine [of the statute] if a slave be accused of adultery and the accuser wishes torture to be applied to him; the statute [in general] requires double his value to be paid to the master, but in this case only the single [amount].

29 (28) MARCIAN, *Criminal Proceedings, book 1:* What is owing from these cases is claimed by *condictio*, which is founded on statute.

30 (29) ULPIAN, *Adulteries, book 4:* The statute has punished the *lenocinium* of a husband who after catching his wife in adultery has kept her and let the adulterer go; for he ought to have avenged himself on the man and also vented his rage on his wife, who has violated their marriage. The circumstances in which the husband is to be punished are when he cannot defend his ignorance [of the adultery] or cloak his forbearance with the pretext of disbelief; for this reason, then, the words of the statute are "[who] lets go an adulterer caught in his house," because its intention is to punish the husband who catches [the adulterer] in his actual wrongdoing. 1. Let us see whether what the statute says, that anyone who marries a woman condemned for adultery is liable under the statute, applies also to *stuprum*; this is the better view. Certainly, if she has been condemned under that statute on some other count, a wife may be married with impunity. 2. He also is punished who takes a bribe [to conceal] a *stuprum* which he has discovered, nor does it make any difference whether he who takes it is the husband or someone else; for whoever takes anything on account of his knowledge of a *stuprum* is liable to be punished. However, if anyone lets [an offender] go without payment, he does not fall under the statute. 3. Anyone who makes a profit out of his wife's adultery is punished; for it is no small crime to have pimped for one's wife. 4. A [husband] is seen as having made a profit out of his wife's adultery if he has accepted anything in return for her committing adultery; and he is not to be exempt [from punishment] according to whether he accepted something on a number of occasions or only once; for a man is rightly to be regarded as having made a profit out of

his wife's adultery if he has accepted anything in return for allowing his wife to commit adultery in the manner of a whore. If, however, he should allow his wife to go astray, not for profit but out of negligence or carelessness or a degree of forbearance or excessive credulity, his position seems to be outside [the scope of] the statute. 5. Six months is the dividing period [for an accusation], so that, in the case of a married woman, the six months are reckoned from the day of her divorce, in that of a widow, from the day the offense was committed; this meaning appears from a rescript sent to the consuls Tertullus and Maximus. Moreover, if it be sixty days since the date of the divorce but a five-year period has elapsed since the commission of the offense, it must be said that the woman cannot be accused; so that the granting of the six *menses utiles* must be taken in the sense that an offense which has been asleep for a continuous period of five years may not be awakened. 6. The legislator intended this five-year period to be observed if an accused person, male or female, faces a charge of *stuprum*, adultery, or *lenocinium*. What, then, if it be another charge deriving from the *lex Julia* which he or she faces, as do those who have made their house available for the purpose of *stuprum*, or others of the same kind? It is better to say that the five-year period is fixed for all offenses arising under the *lex Julia*. 7. The five-year period is to be taken as [beginning] from that day on which the offense was committed, and as [running] to that day on which the man or woman concerned is accused, not to that on which judgment on the adulteries is given. 8. It is added at more length in the *senatus consultum* that if a number of persons are accusing the same man, the initial date of the accusation is necessarily that of the person who [persists] in bringing a charge against the man or woman, that is to say, that the accuser looks to his own documents of accusation, not to those of someone else. 9. There is, however, no doubt that a person who has forcibly committed *stuprum* on either a male or a female can be accused without limit of time, since it is indubitable that he is committing *vis publica*.

31 (30) PAUL, *Adulteries, book 1:* A father cannot bring an action without risk of calumny. 1. The sixty days are counted from [the date of] the divorce; the sixtieth day itself is included within the sixty.

32 (31) PAUL, *Adulteries, book 2:* The five-year period is not [made up] of *dies utiles* but is reckoned continuously. What, then, is to happen if the woman has been charged first and the male adulterer cannot therefore be charged at the same time, and the case is prolonged to the point where the five-year limit is exceeded? What if a person who had brought an accusation against another within the five-year period has failed to carry it through or has prevaricated and a second [accuser] wishes to resume the action against the same accused, and the five-year period is up? The equitable course is for that time which was consumed by the previous accusation to be excluded from the five-year period.

33 (32) MACER, *Criminal Proceedings, book 1:* It does not matter whether a father kills his adulterous daughter first or not, so long as he kills both of them; for if he kills [only] one of them, he will be charged under the *lex Cornelia*. If, however, while one has been killed, the other is [only] wounded, he is not exempted according to the words of the statute; but the deified Marcus and Commodus wrote in a rescript that he should be allowed to go unpunished because, although after the killing of her lover the woman survived such very serious injuries inflicted on her by her father, she was preserved more by fate than by his intention, because the law demands an equal anger and requires an equal severity against [both] those who have been caught. 1. Once a husband has chosen one of the adulterers [to accuse], he cannot accuse the other until the earlier trial be concluded, because two persons cannot lawfully be accused simultaneously by the same man. However, the accuser is not forbidden to accuse, along with the male or female adulterer, the person also who provided his house [for the act] or gave counsel so that the offense might be bought off.

34 (33) MARCIAN, *Criminal Proceedings, book 1:* The deified Pius wrote in a rescript that if anyone states that a slave of his own has committed adultery with her who was his wife, he ought rather to accuse the woman than to torture his slave as a preliminary to an action against her. 1. If anyone does not let go an adulterer but keeps him [by him], as it might be a son [caught] with his stepmother or a freedman or a slave with his wife, he is punished

according to the spirit of the law, even though by its letter [the adulterer] who is retained is not covered. Again, if a [husband] remarries a [wife] dismissed [the house], he is not liable under the words [of the statute], but it must be said that he is to be liable to avoid the possibility of fraud. 2. If a wife accepts a bribe for the adultery of her husband, she is liable under the *lex Julia* as though she were an adulteress.

35 (34) MODESTINUS, *Rules, book 1: Stuprum* is committed by someone who keeps a freewoman for the sake of sexual relations not marriage, unless indeed she is a concubine. 1. Adultery is committed with a married woman; *stuprum* is committed with a widow, a virgin, or a boy.

36 (35) MODESTINUS, *Rules, book 8:* If a person who is about to bring an accusation of adultery makes an error in relation to the indictment, [then] if time permits, he is allowed to correct it to avoid the case falling.

37 (36) PAPINIAN, *Questions, book 3:* If a person below the age of majority commits adultery, he is liable under the *lex Julia*, because [the ability to commit] a crime of this nature begins from puberty.

38 (37) PAPINIAN, *Questions, book 5:* It is laid down that a son-in-power can, without the consent of his father, bring criminal proceedings against his wife for adultery; for he is pursuing satisfaction for his own personal distress.

39 (38) PAPINIAN, *Questions, book 36:* If adultery be committed along with incest, as, for example, [by a man] with his stepdaughter, daughter-in-law, or stepmother, the woman also will suffer a similar punishment; for this would happen even were [the element of] adultery to be removed. 1. If *stuprum* be committed on a sister's daughter, it has to be considered whether the penalty for adultery is enough for the woman. It happens that a dual crime is committed in this case; for it makes a great difference whether a marriage is unlawfully contracted by mistake or whether contempt for the law and defilement of blood ties concur; but we rather consider that a mistake in law on this point also should tell in the woman's favor. 2. A woman, therefore, will suffer the same penalty as males [do] only in that case where she has committed an act of incest forbidden by the *jus gentium*; for if it is only the observance of our own law [the *jus civile*] that is at issue, the woman will be excused from the charge of incest. 3. Sometimes, however, even in the case of males, charges of incest, although they are naturally more serious, are by custom treated more leniently than [those of] adultery, provided only that the incest was incurred by way of an unlawful marriage. 4. Indeed, the brother emperors remitted the charge of incest against Claudia on account of her age but ordered the illegal union to be broken up, although in other cases the crime of adultery, committed at puberty, is not excused by [reason of] age. For it has been stated above that women who are mistaken in law are not liable to a charge of incest, although they can have no defense to an adultery which they have committed. 5. The same emperors wrote in a rescript that after a divorce, [following a marriage] which a stepson had made in good faith with his stepmother, a charge of incest should not be allowed. 6. The same [emperors] sent a rescript to Pollio in these words: "Incestuous marriages are normally not confirmed but are excused; and accordingly we remit the penalty of his past offense to anyone who abstains [from sexual activity] in such a marriage, if he has not yet been charged." 7. But incest which is committed by way of an illicit marital union is customarily excused on the grounds of sex or age, or even of a making good undertaken in good faith by the person liable to punishment, at any rate if a mistake is alleged; and this [is allowed] the more easily if no one has brought a charge. 8. The Emperor Marcus Aurelius and his son Commodus wrote in a rescript: "If a husband, led on by the rush of his grief, kills his wife whom he has caught in adultery, he will not at any rate receive the penalty of the *lex Cornelia* on murderers." And the deified Pius sent a rescript in these words to Apollonius: "It is possible to remit the aggravated death penalty to a man who does not deny that he killed his wife whom he had caught in adultery, since it is extremely difficult to temper one's just grief, and he is to be punished because he did more [than he should have done] rather than because he ought not to have avenged himself. It will be enough, therefore, if he be of low rank, for him to be handed over to forced labor in perpetuity or, if of higher status, to be relegated to an island." 9. A freedman is not readily allowed to assail his patron's reputation; but if he seeks to accuse him of adultery under a husband's right,

he is to be permitted to do so in the same way as if he had suffered a very serious *injuria.* It certainly must be weighed carefully whether he can, after surprising his patron in adultery with his wife, kill him with impunity if [the latter] falls within that class who may be killed when surprised by another. This seems harsh to us; for if the [patron's] reputation should be spared, so much more should his life. 10. If anyone holds any honor or public office, he may indeed be charged [with adultery], but the accusation against him is postponed, and he promises security for appearing in court at the end of his term of office. Tiberius Caesar wrote in a rescript to this effect.

40 (39) PAPINIAN, *Replies, book 15:* It was contained in a sentence [passed by] a provincial governor that a woman had suffered violence; I replied that she had not committed [an offense] against the *lex Julia* on adulteries, although she forbade her injury to be reported immediately to her husband for the sake of protecting her modesty. 1. Again, in the case of a married woman, even though her husband has not first been accused of *lenocinium,* it is possible for a charge of adultery to be brought against her lover by a third party. 2. Again, in the case of marriage, a husband, after the death of his wife, may lawfully require her lover to be listed among those charged. 3. A married woman is not charged with adultery before the male adulterer is condemned, unless, before the second marriage, the notification was sent either to the judge or to the woman's house. 4. I gave an opinion that it was possible [for a husband] to keep in marriage without fear of punishment a wife ordered into exile for association with brigands, because she had not been condemned for adultery. 5. A charge of incest combined with adultery is not excluded by the five-year time limit. 6. It is agreed that two persons, male and female, cannot lawfully be accused simultaneously of a joint offense of adultery, [not even] by the husband. However, when two persons had been accused by someone who afterward wished to drop the charges, I replied that annulment of the accusation was necessary against each of them. 7. A joint charge of incest can be brought against two persons simultaneously. 8. I replied that interrogation under torture should be applied to slaves in respect of an accusation of incest against their masters if and only if the incest were said to have been committed in the course of an adulterous relationship.

41 (40) PAUL, *Replies, book 19:* Can a woman, whose husband has threatened to accuse her on a charge of adultery but has taken no action either under his husband's right or under criminal law, marry the man whom he has named as guilty of adultery with her? Paul replied that there was nothing to prevent the woman who was the subject of the inquiry from marrying the man whom her husband held suspect. 1. Again, if the same husband remarries the same wife, can he be regarded as having abandoned his accusation or having committed *lenocinium*? Paul replied that someone who, after threatening a charge of adultery, has remarried the same wife, is seen as having abandoned [the accusation] and therefore under the same statute his right of bringing an accusation against her subsequently does not survive.

42 (41) PAUL, *Views, book 1:* In a charge of adultery no adjournment should be granted except for the production of the parties or [if] the judge, influenced by the nature of the business, permits this *causa cognita.*

43 (42) TRYPHONINUS, *Disputations, book 2:* If a person who has obtained the *jus anulorum* has committed adultery with his patron's wife or with his patroness, or with the wife of the father, or the mother, or with the wife of the son, or the daughter, of him whose freedman he was, ought he to be punished as a freedman? And if he be caught in the act of adultery can he be killed with impunity? I rather favor the view that he should be liable to the punishment of freedmen, because in the *lex Julia* on the punishment of adulteries it was agreed for the preservation of marriages that [such persons] should be treated as freedmen and it is not right that the position of patrons should be worse on account of the benefit [of the *jus anulorum*].

44 (43) GAIUS, *XII Tables, book 3:* If a repudiation was not sent in accordance with the statute and for that reason a woman should seem still to be married, yet if a man marries her [thereafter], he will not be an adulterer. And so Salvius Julian replied, because, he said, adultery is not committed without malicious intent; although it must be said that a man who knows that she has not been legally divorced must not break the law with malicious intent.

45 (44) PAPINIAN, *Replies, book 4:* Again, on the death of a mother-in-law, her son-in-law may be charged with incest, as an adulterer [can be] after the death of the woman.

6

LEX JULIA ON *VIS PUBLICA*

1 MARCIAN, *Institutes, book 14:* A man is liable under the *lex Julia* on *vis publica* on the grounds that he collects arms or weapons at his home or on his farm or at his country house beyond those customary for hunting or for a journey by land or sea.

2 SCAEVOLA, *Rules, book 4:* But those arms are excepted which someone has by way of trade or which come to him by inheritance.

3 MARCIAN, *Institutes, book 14:* Under the same heading come those who have entered into a conspiracy to raise a mob or a sedition or who keep either slaves or freemen under arms. 1. A man is also liable under the same statute if, being of full age, he appears in public with a missile weapon. 2. Under the same heading come those who, assembling seditiously in the most wicked manner, attack country houses and seize property with missile and hand weapons. 3. Also liable is the man who seizes anything from a fire, excepting building materials. 4. Furthermore, anyone who forcibly violates a boy or a woman or any other person is punished by the penalty of this statute. 5. Anyone who has been present at a fire with a sword or missile weapon for the purpose of robbery or of preventing the owner from rescuing his property is liable to the same penalty. 6. Also liable under this statute is anyone who with armed men expels someone having possession from his home, his farm, or his ship, or attacks him,

4 ULPIAN, *Edict, book 59:* or lends men for this purpose.

5 MARCIAN, *Institutes, book 14:* Also liable is anyone who in a gathering, assembly, mob, or sedition commits arson; or anyone who with malicious intent shuts a person up or besieges him; anyone who does anything to prevent a burial, to plunder or frustrate a funeral; or anyone who puts another under an obligation to him by force; for the law voids such an obligation. 1. If the matter at issue concerns both *vis* and possession or ownership, the deified Pius sent a rescript in Greek to the community of Thessaly that the question of *vis* should be investigated before that of the ownership of the thing; and he decreed also that the complaint concerning *vis* should be laid before that concerning the right of ownership or possession. 2. Anyone who has raped a single or married woman is punished by the extreme penalty, and even if the woman's father, moved by entreaties, forgives the injury done to him, yet a third party may still charge the guilty man outside the five-year limit, since the crime of rape exceeds the scope of the *lex Julia* on adulterers.

6 ULPIAN, *Duties of Proconsul, book 7:* The deified Pius also wrote in a rescript that the person who forcibly abducted a freeborn boy was to be punished in these words: "I have ordered that there should be submitted a copy of the written charge given to me by Domitius Silvanus in the name of his uncle, Domitius Silvanus, having been moved by his complaint in which he indicated that his freeborn son, while still a boy, had been abducted and imprisoned, then flogged and tortured to the most severe

danger [of his life]; my dearest Geminus, I would wish you to give him a hearing and, if you find these things have been thus committed, to pursue the matter with severity."

7 ULPIAN, *Duties of Proconsul, book 8:* Also liable under the *lex Julia* on *vis publica* is anyone who, while holding *imperium* or office, puts to death or flogs a Roman citizen contrary to his [right of] appeal or orders any of the aforementioned things to be done, or puts [a yoke] on his neck so that he may be tortured. Again, so far as relates to ambassadors, pleaders, or those who accompany them, anyone who is proved to have beaten or done them an injury.

8 MAECIAN, *Criminal Proceedings, book 5:* It is provided in the *lex Julia* on *vis publica* that no one is to bind or hinder an accused so as to prevent his attending at Rome within the fixed period.

9 PAUL, *Edict, book 7:* We should understand the term "armed men" as meaning those who have not only weapons but also anything else which can inflict damage.

10 ULPIAN, *Edict, book 68:* Anyone who does something with malicious intent to hinder the safe exercise of justice or to hinder judges in the proper giving of judgment, or [to hinder] anyone holding office or power from giving decrees or orders or from acting as he has the right to do; anyone who by means of *injuria* extorts from someone against his will a promise in public or in private to give games or money; also anyone who with malicious intent is present with a weapon at an assembly or a place where judgment is to be given publicly. An exception is made for anyone who is allowed, for the purpose of hunting, to have men [equipped] to fight with wild beasts, and to have attendants for those purposes. 1. Also liable under this statute is he who after summoning men together commits *vis*, whereby someone is flogged or beaten, even if nobody is killed. 2. A person found guilty of *vis publica* is interdicted from fire and water.

11 PAUL, *Views, book 5:* Those who loot, break open, or storm the homes or country houses of others, if, indeed, they gathered an armed mob, receive capital punishment. 1. In the term "weapons" all objects from which injury can result to a man's health are included. 2. Persons who bear weapons for the purpose of protecting their own safety are not regarded as carrying them for the purpose of homicide.

12 PAUL, *Senatus Consultum Turpillianum, sole book:* Those who impose new taxes are liable under the *lex Julia* on *vis publica.*

7

LEX JULIA ON *VIS PRIVATA*

1 MARCIAN, *Institutes, book 14:* Under the *lex Julia,* one third of the property of anyone condemned for *vis privata* is to be confiscated, and it is laid down that he may not be a senator or decurion, nor hold any office, nor sit in that *ordo,* nor be a judge; and by *senatus consultum* he shall be deprived undoubtedly of all office as though

infamous. 1. The same penalty is inflicted on those who fall under the penalty of the *lex Julia* on *vis privata*, as also on anyone who with malicious intent seizes anything from a shipwreck. 2. In addition, however, in accordance with the imperial constitutions, those who steal anything from shipwrecks are punished *extra ordinem*; for the deified Pius wrote in a rescript that there must be no *vis* shown to sailors and that if anyone does so, he should be punished most severely.

2 SCAEVOLA, *Rules, book 4:* Anyone who, after summoning men together, commits *vis* resulting in anyone's being flogged or beaten, [even if] nobody is killed, is liable under this statute.

3 MACER, *Criminal [Proceedings], book 1:* Nor does it matter whether those he summoned together for the purpose of causing *vis* were freemen or slaves and, [if the latter], his own or another's. 1. Those who have been thus summoned together are no less liable under the same statute. 2. Even if none has been summoned together and none beaten, yet something has wrongfully been taken from another's property, the man who did this is liable under this statute.

4 PAUL, *Edict, book 55:* An offense is committed under the *lex Julia* on *vis privata* when anyone is alleged to have raised a mob or a gathering to prevent someone's being brought to court. 1. Again, if anyone has had another man's slave put to the torture; [although this matter hardly calls for a public criminal trial, and], therefore, Labeo says that one should with more discretion make use of the praetor's edict on *injuria*.

5 ULPIAN, *Edict, book 69:* If [the owner] drives a man off his land with an unarmed mob, he may be charged with *vis privata*.

6 MODESTINUS, *Rules, book 8:* In accordance with the *senatus consultum Volusianum*, persons are liable under the *lex Julia* on *vis privata* who dishonestly combine in a third party's action with the intention of sharing out between them whatever shall be recovered for his property after his [opponent's] condemnation.

7 CALLISTRATUS, *Judicial Examinations, book 5:* If creditors proceed against their debtors, they should claim what they reckon is owed to them through the agency of a judge; otherwise, if they enter upon the debtor's property without anyone's permission, the deified Marcus decreed that they should not have creditors' rights. The words of the decree are as follows: "It is best that, if you think you have claims, you should pursue them by actions at law; meantime the other party should remain in possession, you are the claimant." And although Marcian said, "I have done no *vis*," Caesar said: "Do you think that *vis* occurs only if men are wounded? It occurs whenever anyone demands what he thinks is owed to him otherwise than through the agency of a judge. But I do not think it consonant with your modesty, dignity, or compassion to do something without right. Whoever then shall be proved to me to have taken possession, recklessly and without resort to a judge, of any property of a debtor which has not been handed over to him by the debtor, and to have said that he had a right over that property, shall not have creditor's rights."

8 MODESTINUS, *Punishments, book 2:* If a creditor without the authority of a judge occupies the property of a debtor, he is liable under this law, and is fined one third of his property and becomes infamous.

8

LEX CORNELIA ON MURDERERS AND POISONERS

1 MARCIAN, *Institutes, book 14:* Under the *lex Cornelia* on murderers and poisoners, someone is liable who kills any man or by whose malicious intent a fire is set; or who goes about with a weapon for the purpose of homicide or a theft; or who, being a magistrate or presiding over a criminal trial, arranged for someone to give false evidence

so that an innocent man may be entrapped [and] condemned. 1. He also is liable who makes up [and] administers poison for the purpose of killing a man; or who with malicious intent gives false evidence so that someone may be condemned in criminal proceedings for a capital offense; or who, being a magistrate or judge of a [jury] court in a capital case, takes a bribe so that [the accused] may be found guilty under criminal law. 2. Whoever kills a man is punished without distinction as to the status of the man he killed. 3. The deified Hadrian wrote in a rescript that he who kills a man, if he committed this act without the intention of causing death, could be acquitted; and he who did not kill a man but wounded him with the intention of killing ought to be found guilty of homicide. On this account, it should be laid down that if someone draws his sword or strikes with a weapon, he undoubtedly did so with the intention of causing death; but if he struck someone with a key or a saucepan in the course of a brawl, although he strikes [the blow] with iron, yet it was not with the intention of killing.[2] From this it is deduced that he who has killed a man in a brawl by accident rather than design should suffer a lighter penalty. 4. Again, the deified Hadrian wrote in a rescript that he who kills someone forcibly making a sexual assault on him or a member of his family should be discharged. 5. The deified Pius wrote that a lighter penalty should be imposed on him who killed his wife caught in adultery, and ordered that a person of low rank should be exiled permanently, but that one of any standing should be relegated for a set period.

2 ULPIAN, *Adulterers, book 1:* A father cannot kill his son without giving him a hearing but must accuse him before the prefect or the provincial governor.

3 MARCIAN, *Institutes, book 14:* Under chapter five of the same *lex Cornelia* on murderers and poisoners, someone is punished who makes, sells, or possesses a drug for the purpose of homicide. 1. The person who sells baneful potions to the public or possesses them for the purpose of homicide is liable to the penalty of the same statute. 2. The addition of the phrase "baneful drugs" indicates that there are certain drugs which are not baneful. The term is therefore neutral, covering as much a drug prepared for the purpose of healing as one for the purpose of killing, as also that which is called an aphrodisiac. However, only that [kind of drug] is mentioned in the statute which is possessed for the purpose of homicide. It is, however, ordered by *senatus consultum* that a woman who, not admittedly maliciously but inadvisedly, has administered a fertility drug from which the recipient dies shall be relegated. 3. It is laid down by another *senatus consultum* that dealers in cosmetics are liable to the penalty of this law if they recklessly hand over to anyone hemlock, salamander, monkshood, pinegrubs, or a venomous beetle, mandragora, or, except for the purpose of purification, Spanish fly. 4. Again, he is liable whose *familia*, with his knowledge, takes up arms with the intention of acquiring or recovering possession; also he who instigates a sedition; and he who conceals a shipwreck; and he who produces, or is responsible for the production of, false evidence for the entrapment of an innocent person; again, any-

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[2] *Collatio* (1, 6, 2–4) quotes ULPIAN, *Duties of Proconsul, book 7,* for another version of Hadrian's rescript: "He who has killed a man is customarily acquitted, that is if he did it without the intention of killing, and he who has not killed but sought to kill is condemned as a murderer. It is therefore to be laid down on this ground—was it with iron that Epaphroditas struck the blow? For if he drew a sword or struck with a weapon, what doubt is there that he struck with the intention of killing? If, however, he struck with a key or a saucepan, or [even] struck with iron in the course of a chance brawl, but without design to kill [he should be acquitted]. Therefore, find this out and, if there was an intention to kill, order the slave to be put to the extreme penalty as a murderer, in accordance with the law."

one who castrates a man for lust or for gain is by *senatus consultum* subject to the penalty of the *lex Cornelia*. 5. The penalty of the *lex Cornelia* on murderers and poisoners is deportation to an island and the forfeiture of all property. However, nowadays capital punishment is customary, except for persons of a status too high to be subject to the [modern] statutory punishment; those of lower rank are usually either crucified or thrown to the beasts while their betters are deported to an island. 6. It is lawful to kill deserters to the enemy wherever they are met with, as though they were enemies.

4 ULPIAN, *Duties of Proconsul, book 7:* Under the *lex Cornelia* on murderers anyone is liable who, while holding a magistracy, takes any action not permitted by statute concerning the death of a man. 1. When someone had caused a death for sport, the deified Hadrian confirmed the action of Ignatius Taurinus, governor of Baetica, in relegating him for a five-year period. 2. The same deified Hadrian wrote in a rescript: "It is laid down, in order to end the practice of making eunuchs, that those who are found guilty of this crime are to be liable to the penalty of the *lex Cornelia*, and their goods must deservedly be forfeit to my imperial treasury. Slaves, however, who castrate others are to be punished with the extreme penalty. If those who are liable on this charge fail to appear in court, sentence is to be pronounced in their absence as if they were liable under the *lex Cornelia*. It is certain that if those who have suffered this outrage announce the fact, the provincial governor must give those who have lost their manhood a hearing; for no one should castrate another, freeman or slave, willing or unwilling, nor should anyone voluntarily offer himself for castration. Should anyone act in defiance of my edict, the doctor performing the operation shall suffer a capital penalty, as shall anyone who voluntarily offered himself for surgery."

5 PAUL, *Duties of Proconsul, book 2:* Under the constitution of the deified Hadrian to Ninnius Hasta, those too who crush the testicles of others are in the same position as those who castrate them [with a knife].

6 VENULEIUS SATURNINUS, *Duties of Proconsul, book 1:* It is provided by a *senatus consultum* given in the consulship of Neratius Priscus and Annius Verus that whoever hands his slave over for castration is fined half his property.

7 PAUL, *Criminal Proceedings, sole book:* Under the *lex Cornelia*, guilty intention is presumed from the deed. But, under this law, gross negligence is not interpreted as guilty intention. Accordingly, if someone throws himself from a height and lands on another, killing him, or a pruner when throwing down a branch from a tree fails to shout a warning and kills a passer-by, punishment under this statute is not applicable.

8 ULPIAN, *Edict, book 33:* If it is proved that a woman has done violence to her womb to bring about an abortion, the provincial governor shall send her into exile.

9 ULPIAN, *Edict, book 37:* If anyone kills a thief by night, he shall do so unpunished if and only if he could not have spared the man['s life] without risk to his own.

10 ULPIAN, *Edict, book 18:* If anyone with malicious intent sets fire to my block of flats, he shall suffer the capital penalty as an arsonist.

11 MODESTINUS, *Rules, book 6:* By a rescript of the deified Pius it is allowed only to Jews to circumcise their own sons; a person not of that religion who does so suffers the penalty of one carrying out a castration. 1. If a slave be thrown to the beasts without [having been before] a judge, not only he who sold him but also he who bought him shall be liable to punishment. 2. Following the *lex Petronia* and the *senatus consulta* relating to it, masters have lost the power of handing over at their own discretion their slaves to fight with the beasts; but after the slave has been produced before a judge, if his master's complaint is just, he shall in this case be handed over to punishment.

12 MODESTINUS, *Rules, book 8:* An infant or a madman who kills a man is not liable under the *lex Cornelia*, the one being protected by the innocence of his intent, the other excused by the misfortune of his condition.

13 MODESTINUS, *Encyclopaedia, book 12:* By *senatus consultum* the man who performs or organizes evil sacrifices is ordered to be condemned to the penalty of this statute.

14 CALLISTRATUS, *Judicial Examinations, book 6:* The deified Hadrian wrote a rescript in the following words: "In crimes it is the intention, not the issue, to which regard is paid."

15 ULPIAN, *Lex Julia et Papia, book 8:* It makes no difference whether someone kills or provides the occasion of death.

16 MODESTINUS, *Punishments, book 3:* Those who have committed murder of their own free will and with malicious intent, if they hold office are normally deported; if they are of inferior station, they suffer the capital penalty. This can more readily be done in the case of decurions, but in such a way that [capital punishment] takes place [only] when the emperor has first been consulted and orders it [to be carried out], unless perchance a disorder could not otherwise be quietened down.

17 PAUL, *Views, book 5:* If a man dies after being struck in a brawl, one must have regard to the blows delivered by each of those who gathered together for the purpose.[3]

9

LEX POMPEIA ON PARRICIDES

1 MARCIAN, *Institutes, book 14:* By the *lex Pompeia* on parricides it is laid down that anyone who kills his father, mother, grandfather, grandmother, brother, sister, first cousin on the father's side, first cousin on the mother's side, paternal or maternal uncle, paternal [or maternal] aunt, first cousin (male or female) by mother's sister, wife, husband, father-in-law, son-in-law, mother-in-law, [daughter-in-law], stepfather, stepson, stepdaughter, patron or patroness, or with malicious intent brings this about, shall be liable to the same penalty as that of the *lex Cornelia* on murderers. And a mother who kills her son or daughter suffers the penalty of the same statute, as does a grandfather who kills a grandson; and in addition, a person who buys poison to give to his father, even though he is unable to administer it.

2 SCAEVOLA, *Rules, book 4:* The brother [of a parricide], who had knowledge only [not proof] and did not warn his father, was relegated, and the doctor [who supplied the drug] was put to death.

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[3] *Collatio* [1, 7, 2] offers a variant: "But if a man dies after being struck in a brawl, because one must also have regard to the blows themselves struck against each man who took part, therefore those of low rank are condemned to the games or the mines, those of high status are fined half their property and relegated."

3 MARCIAN, *Institutes, book 14:* It must be known that first cousins are included under the *lex Pompeia,* but that others of an equal or closer degree of kindred are not similarly covered. Stepmothers and betrothed persons are left out, but are covered by the spirit of the law,

4 MARCIAN, *Criminal Proceedings, book 1:* since the father and mother of the betrothed, male or female, are contained in the term "fathers-in-law" as are those engaged to one's children in the term "sons-in-law."

5 MARCIAN, *Institutes, book 14:* It is said that when a certain man had killed in the course of a hunt his son, who had been committing adultery with his stepmother, the deified Hadrian deported him to an island [because he acted] more [like] a brigand in killing him than as [one] with a father's right; for paternal power ought to depend on compassion, not cruelty.

6 ULPIAN, *Duties of Proconsul, book 8:* Should [only] those who kill their parents be liable to the penalty for parricide, or their accomplices also? Maecian says that the accomplices also are liable to the same penalty, and not the parricides alone. Hence, accomplices, even if outside the family, are liable to the same penalty.

7 ULPIAN, *Edict, book 29:* If, with the knowledge of a creditor, money is furnished for the commission of a crime, say for the procuring of poison or for payment to bandits or assailants for the killing of a father, he who seeks [to borrow] the money and he who thus lends it, or [he] by whom it is promised, shall [all] be liable to the penalty for parricide.

8 ULPIAN, *Disputations, book 8:* If someone who has been accused of parricide dies in the meantime, then if he brought about his own death, the imperial treasury must be his heir; otherwise, provided he made a will, [the heir shall] be that person whom he wished; or if he died intestate, he shall have as heirs those called by law.

9 MODESTINUS, *Encyclopaedia, book 12:* According to the custom of our ancestors, the punishment instituted for parricide was as follows: A parricide is flogged with blood-colored rods, then sewn up in a sack with a dog, a dunghill cock, a viper, and a monkey; then the sack is thrown into the depths of the sea. This is the procedure if the sea is close at hand; otherwise, he is thrown to the beasts, according to the constitution of the deified Hadrian. 1. Those who kill persons other than their mother, father, grandfather, or grandmother (who, as we have said above, are punished in the traditional way) shall be punished capitally or put to the extreme penalty. Truly, if anyone kills a parent in a fit of madness, he shall not be punished, as the deified brothers wrote in a rescript in the case of a man who had killed his mother in a fit of madness; for it was enough for him to be punished by the madness itself, and he must be guarded the more carefully, or even confined with chains.

10 PAUL, *Penalties under All the Laws, sole book:* An accusation is always allowed against those who can be liable to the penalty for parricide.

10

LEX CORNELIA ON FALSEHOODS AND THE *SENATUS CONSULTUM LIBONIANUM*

1 MARCIAN, *Institutes, book 14:* The penalty of the *lex Cornelia* is imposed on a person who with malicious intent conspires for the giving of false witness or the delivering one after another of false evidence. 1. Again, he who takes money for furnishing

advocacy or evidence or makes an agreement [or] forms a conspiracy to ensnare the innocent is punished under the *senatus consultum.* 2. Also if anyone takes money for renouncing or withdrawing evidence or for giving or withholding [evidence], he is subject to the penalty of the *lex Cornelia.* So also is [the person] who corrupts, or provides for the corruption of, a judge. 3. Also if a judge neglects the imperial constitutions, he is punished. 4. Those who make a false entry or remove an item from accounts, registers, wax tablets, or any other such thing without the affixing of a seal are for just these reasons punished precisely as if they were forgers. Thus, also the deified Severus condemned the prefect of Egypt under the *lex Cornelia* on forgery, because he made a false entry in his records while he was in charge of the province. 5. A person who opens the will of someone who is still alive is liable to the penalty of the *lex Cornelia.* 6. A person who alleges that another with whom he lodged documents has betrayed them to his adversaries can accuse him of forgery. 7. The *senatus consultum* applies to the wills of soldiers, whereby those who write in a legacy or *fideicommissum* for themselves are liable under the *lex Cornelia.* 8. There is this difference between a son, a slave, and a person outside the family when writing out a will, that in the case of the outside person the penalty ceases to apply, and [the legacy] may be taken, if a specific signed clause is added "which I have dictated to him and have confirmed," while with the son or the slave a signed clause in general terms is sufficient to avoid the penalty and enable [the legacy] to be taken. 9. A man is liable to the penalty for forgery for this reason also (as the deified Severus and Antoninus also laid down), so that tutors and curators and those who have laid down this duty but have not restored [to the pupil or ward] their tutory or curatory cannot come to an agreement with the imperial treasury, and if anyone contrary to this law cheats the prefects or the state treasury he is punished in exactly the same manner as if he had committed a forgery. 10. This does not, however, apply (as those same emperors wrote in a rescript) to those who have done such acts before taking up a tutory; for [the emperors] have not accepted their excuses but have barred [accusations of] fraud. 11. The same emperors wrote in a rescript that a man who has not yet rendered the accounts of his tutory or curatory must not come to an agreement with the imperial treasury only if the person whose tutory he has been administering is alive; for if he has died, it is lawful for him to come to such an agreement, even if he has not yet rendered his accounts to the heir. 12. But if a tutor or curator has succeeded by right of inheritance to an agreement with the imperial treasury, even before the accounts are rendered, I do not think that there is any scope for a penalty, even if the person whose tutory or curatory was being administered is still alive. 13. The penalty for forgery or its equivalent is deportation and confiscation of all property; and if a slave commits any of these [offenses], it is ordered that he suffer the extreme penalty.

2 PAUL, *Sabinus, book 3:* A person who steals, hides, takes away, destroys, partially erases, substitutes, or unseals a will, or with malicious intent writes, seals, or recites a false will, or by whose malicious intent this is done, is condemned to the penalty of the *lex Cornelia.*

3 ULPIAN, *Disputations, book 4:* A person who, not knowing a will to be false, has either entered upon an inheritance or accepted a legacy, or in some way or other acknowledged it, is not debarred from declaring the will to be false.

4 ULPIAN, *Disputations, book 8:* If someone dies after arranging for a legacy to him to be written falsely into a will, [the property] is to be wrested from [his] heir as well. Thence also the deified Marcus thought that when a certain man, who had been instituted heir by his father, died after cutting out some codicils, the imperial treasury should have a claim on only so much as could be disposed of by those codicils, that is, up to three quarters [of the estate].

5 JULIAN, *Digest, book 86:* The senate remitted the penalty to a person who had, by codicils written in his own hand, taken back legacies conveyed by him under a will, because he had done this at the command of his father and was [less than] twenty-five years of age; he was also allowed to take his inheritance.

6 AFRICANUS, *Questions, book 3:* If anyone writes in a legacy for himself, he is liable to the penalty of the *lex Cornelia,* even though the legacy is invalid; for it is also agreed that he is liable if he writes a legacy to himself into a will albeit that it is subsequently broken, or even was invalid from the beginning. But this then is true when the will is in due form. But if [the will] has not been sealed, the prevailing view is that there is no scope for the *senatus consultum,* just as there is no scope for an interdict for the production of a will; for there to be scope for the *senatus consultum* there must first be some kind of a will, even if not one lawfully made. For what is correctly called a forged will is only one which, had it not been spurious but true, would properly be called a will. Similarly, therefore, a will described as not lawfully made is one which, had everything been done according to rule, would be called lawfully made. 1. If a person instituted as heir writes a disherison by name of a son or any other persons, he is liable under the *senatus consultum.* 2. Similarly, a person who in his own hand withdraws the liberty granted to a slave of the testator, and particularly from one to whom legacies or *fideicommissa* had been conveyed by himself, is liable under the *senatus consultum.* 3. If a patron writes a legacy to himself into the will of a freedman and, after having obtained pardon, has been ordered to refrain from taking the legacy, should he be able to have the advantage of *bonorum possessio contra tabulas?* The better view is that he cannot. However, it does not follow from this, if a wife writes in her dowry or a creditor the amount owing to him on the appointed day, and they likewise obtain pardon and are ordered to refrain from taking the legacy, that either the wife's action for her dowry or the creditor's action [for his debt] should be denied, lest either of them should be deprived of what is justly owed.

7 MARCIAN, *Institutes, book 2:* Slaves can in no way bring actions against their masters, since they are reckoned as altogether unable to raise actions in the *jus civile* most surely, and also not in praetorian law nor in *cognito* proceedings; except for [the

case] of which as a concession the deified Marcus and Commodus wrote in a rescript, when a slave was making a complaint that the tablets of a will, in which he had been granted his freedom, were suppressed, that he should be allowed to bring an accusation concerning the suppression of the will.

8 ULPIAN, *Duties of Proconsul, book 7:* Persons who on the one hand shave down gold coins or on the other wash [with gilt] or cast [other coins], if they are freemen should be thrown to the beasts, if slaves, sentenced to the extreme penalty.

9 ULPIAN, *Duties of Proconsul, book 8:* It is provided by the *lex Cornelia* that someone who adds base metal to gold or who casts counterfeit silver coins is liable for the crime of forgery. 1. The same penalty is also imposed on a person who, although having the power to forbid such an action, did not forbid it. 2. The same statute expressly lays down that no person should with malicious intent seek to buy or sell coins made of tin or lead. 3. The penalty of the *lex Cornelia* is visited on him who knowingly and with malicious intent seals or arranges for the sealing of something other than a will, and also [on those] who with malicious intent conspire for the giving of false witness or the delivering one after another of false evidence. 4. A person who has suborned an accuser to appear in a case involving money is liable to the same penalty as those who have taken money for instigating lawsuits.

10 MACER, *Criminal [Proceedings], book 1:* No provision is made in the *senatus consulta* for a person who writes something in [to a will] for the person in whose power he is, or for someone else in the same power; but in this event also it is an offense under the law, because the benefit of the act goes to the father or master to whom it would apply if the son or slave had written in for himself. 1. This point is agreed: that if anyone writes in a legacy to a person outside the family though later, during the testator's lifetime, he comes to have him in his power, there is no place for the *senatus consulta.*

11 MARCIAN, *Criminal Proceedings, book 1:* If a father whose son-in-power is a soldier writes a [legacy] for that son into the will of a fellow soldier with whom [the son] has become acquainted through his military service, then because [the legacy] is not acquired by the father, the matter falls outside the penalty [of the *lex Cornelia*]. And the deified brothers wrote in a rescript, when a son had written in a [legacy] to his mother that when he had written at the command of the testator, he should be unpunished and his mother could take the legacy.

12 PAPINIAN, *Replies, book 13:* When a person guilty of forgery dies before the charge is brought in, or before sentence is pronounced, while the *lex Cornelia* ceases to apply, that which he obtained by his crime is not left to his heir.

13 PAPINIAN, *Replies, book 15:* To lay claim to a false *nomen* or *cognomen* is punished by the penalty for fraud. 1. I gave the opinion that an advocate, who had been removed from the order of decurions for ten years for reading out a forged document when the governor was presiding over the court, recovered his station at the end of that period because, having read a forgery, but not concocted it, he did not fall under the *lex Cornelia.* By the same argument, [my opinion was that] a plebeian punished for the same reason by temporary exile can properly be made a decurion after his return.

14 PAUL, *Questions, book 22:* When an emancipated son was writing his father's will, he wrote in at his father's order a legacy to a slave owned jointly by Titius and himself; I ask how this question should be resolved. He gave as an opinion: You have joined a number of questions together. Indeed, so far as the *senatus consultum* is concerned, by which we are forbidden to write in a legacy for ourselves or those whom we have in our power, an emancipated son also is liable to the same penalty, even although he

wrote at his father's order; for the person who does seem to be excused is he who is in power, such as a slave, provided however that the order appears [confirmed] by the testator's signature; for such I have found was the senate's intention. 1. The next question is whether, since it is agreed that what has been written illegally is as if it had not been written, [the legacy] that was written in for the slave owned jointly by the writer and another should be regarded as not written in its entirety, or only as far as it relates to the writer but the whole is due to the co-owner. I found that Marcellus had commented on Julian; for since Julian had written that if the man had written [a legacy] for Titius and himself or for their joint slave, since what he wrote for himself was held as though not written, it can very readily be ascertained how much is acquired by Titius and [another] co-owner in this way. Marcellus himself added: How will anything be due to the co-owner if the name of the slave is removed as if it were forged? And this should be considered in the present instance. 2. A husband manumitted a dotal slave and wrote a legacy to himself into the [latter's] will. The question was asked: What can the wife recover under the *lex Julia*? I gave as an opinion: It must be said that a patron falls under the penalty of the edict of the deified Claudius, as [did] an emancipated son, notwithstanding that if passed over [in the will] they can seek *bonorum possessio*. Therefore, if the patron receives nothing from his freedman's property, he will not be liable to his wife. Can he then be liable under the additional provision in the *lex* [*Julia*] "or does something fraudulently to prevent its coming to him?" However, he did nothing to defraud his wife; for his scheme was not against her. Do we not then refuse him the actions [to claim a legacy], since he is liable to make restitution to another? But when a man, who wrote in a legacy to himself at the order of the testator, also made a *fideicommissum* to himself, likewise at the bidding of the testator, [asking him] to restore something to another, the senate nonetheless ordered that he should refrain from taking the legacy, and that it, with the burden of the *fideicommissum*, should remain with the heir.

15 CALLISTRATUS, *Questions, book 1:* The deified Claudius ordered in an edict that there should be added to the *lex Cornelia* that anyone who, in writing another's will or codicils, writes in a legacy to himself in his own hand is then liable just as if he had offended against the *lex Cornelia*, nor should he be pardoned if he alleges that he had not known of the stringency of the edict. However, writing in a legacy for himself seems to cover not only the person who does it in his own hand but also him who is granted a legacy by the agency of his own slave or his son-in-power at the dictation of the testator. 1. It is expressly provided in the imperial constitutions that if the testator has specifically attested with his signature that he has dictated to a person's slave that his master is to be given a legacy by the heirs, this is valid; but that a general signature of the testator is not valid against the authority of the *senatus consultum*, and accordingly, the legacy is to be treated as if it had not been written, and pardon granted to the slave who actually wrote in a legacy to himself. For myself I think that it is safer to apply for pardon from the emperor, refraining of course from the legacy meantime. 2. Again, the senate held that if a slave at his master's order writes his own freedom into a will or codicils, on account of its being written with his own hand, he should not be free but that his freedom is assured on the grounds of a *fideicommissum*, provided only that after the writing [of that manumission] the testator signed

his will or codicils with his own hand. 3. And insofar as the *senatus consultum* covered only this one aspect of freedom by *fideicommissum*, the deified Pius wrote in a rescript that one should follow the spirit rather than the letter of this *senatus consultum*; for slaves, when obeying their masters, are excused by the constraint of the power [to which they are subject], provided that the master's authority is added by a signed clause that he has dictated and confirmed these matters; for, [the emperor] says, what was written at the wish of the master is treated as if written in his own hand. "This [principle], however," he says, "ought not to be extended to freemen over whom the testator has no legal power; but you must ask whether they are similarly under a duty to comply and whether there is not an honorable excuse for their doing what is not permitted." 4. Again, a mother whose son dictated a legacy to her at the hand of her slave was held to be entitled to a pardon under the *lex Cornelia*. 5. The senate was of the same view in the case of a daughter who, at her mother's dictation and in ignorance of the law, had written a legacy to herself. 6. If anyone, after instituting two heirs, adds that if one or other of them dies without issue, the inheritance shall pass to him who survives and has children, or if both die childless, the inheritance (and from here on in another hand) shall revert to the writer of the will, it has been resolved that the person drawing up the will shall be spared the penalty of the *lex Cornelia*. But it is more charitable that he should acquire in a similar way those things also which are set out above.

16 PAUL, *Replies, book 3:* He gave as an opinion that the offense of pilfering legal documents was not one for criminal proceedings unless it was proved that it was someone's will that had been stolen. 1. Paul gave the opinion that all those persons who had sealed documents even other than wills with forged wax were liable to the penalty of the *lex Cornelia*. 2. There is, however, no doubt that the same penalty is customarily applied to those others who have made a false entry in account books, tablets, public records, or any other such thing without the affixing of a seal, or have hidden, filched, destroyed, substituted, or unsealed anything so that the truth may not be revealed.

17 PAUL, *Fideicommissa, book 3:* When someone had written in, in his own hand, a slave as a legacy to himself and had been asked to manumit him, the senate held that all the heirs should manumit him.

18 PAUL, *Views, book 3:* We are not forbidden to write a legacy to our wife into another person's will. 1. A person who has written himself into a will as tutor to the testator's infant son, although he is presumed to be suspect, because he appears to be striving to obtain a tutory of his own accord, may, if he is shown to be suitable, still be appointed as tutor not by the will, but by the decree [of a magistrate]. Nor shall his defense be accepted that he appears to have complied with the wish of the testator.

19 PAUL, *Views, book 5:* Persons who strike false coinage, if they did not intend a complete likeness, are forgiven where they have shown evidence of a proper repentance. 1. An accusation of substitution of a child is never cut off by prescription of time, nor does it matter even if the woman alleged to have substituted the child has died.

20 HERMOGENIAN, *Epitome of Law, book 6:* These are punished by the penalty for forgery: those who take money for furnishing a lawsuit with advocacy or evidence; those who make a contract or agreement; those who enter into a conspiracy; or those who act to bring about any of those things.

21 PAUL, *Senatus Consultum Turpillianum, sole book:* Anyone who sells the same thing as a complete whole by separate contracts to two persons is punished by the penalty for forgery, as was laid down by the deified Hadrian. There is added also the

person who corrupts a judge. However, they are usually punished fairly lightly by relegation for a finite period without confiscation of property.

22 PAUL, *Senatus Consultum Libonianum, sole book:* It must be said that a person under the age of puberty does not fall under this edict, since he can hardly be liable to a charge of forgery when malicious intent does not occur at that age. 1. If a father writes into [another's will] a legacy to a son who is in enemy hands, on that son's return he is held to be liable to the penalty of the *senatus consultum;* but if the son dies there, the father is held to be guiltless. 2. However, if he writes in [a legacy] to an emancipated son, his action will be proper; and similarly, to a son he has given in adoption. 3. Again, if he writes in [a legacy] for a slave, to whom he had delayed in granting liberty under a *fideicommissum,* he must be held to be outside the tenor of the *senatus consultum,* since it is agreed that everything which has been acquired by the agency of a slave of this kind ought to be returned to him when he is manumitted. 4. Also if he writes in something to a slave serving as such in good faith, although guilty as regards his intentions because he wrote it in for one whom he believed to be his own property yet, because neither a legacy nor an inheritance is acquired for a bona fide *possessor,* we hold that he should be exempt from the penalty. 5. If a master writes in a legacy to a slave for when he shall be free, we hold that the master is exempt from the *senatus consultum* because he is in no way looking to his own advantage. And the same can be said of a son afterward emancipated. 6. A person who confirms codicils made before a will, in which [codicils] a legacy had been written in to him, falls under the *senatus consultum;* and so Julian writes. 7. Also by taking something away, a person must be liable to the penalty, just as if he had given himself something: for example, if he takes away with his own hand the freedom of a slave left to him as a legacy and manumitted by the same [testator] (that is, if he takes it away at the wish of the testator; if [the testator] is unaware, the [gift of] freedom holds good), or again, if, after being asked to restore a legacy written in to himself, he cuts out a *fideicommissum.* 8. A person who writes in with his own hand the assignation of a freedman['s services] to himself is liable, not under the letter but under the spirit of the *senatus consultum.* 9. Again, the wording does not cover the slave who inserts his own freedom as a *fideicommissum* in another's will. There can, however, be no doubt about this since, as we have said above, the senate has only remitted the penalty to a person who has written in a *fideicommissum* of liberty to himself in his master's will if the master signed it. Certainly, it must be said that he contravenes the *senatus consultum* to a greater extent than one who writes in a legacy to himself, since liberty will in every way belong to him alone, but a legacy can be acquired by his master. 10. If the person drawing up a will gives freedom by *fideicommissum* to his slave, let us see whether he is not outside the scope of the penalty, since it brings him no advantage, unless he writes in that the slave is to be redeemed from him for a large sum and manumitted. 11. However, the person who, when a farm was left as a legacy to Titius, added in his own hand the condition that the money should be given to himself, falls under the spirit of the *senatus consultum.* 12. But he who, at his father's wish, disinherits himself or strikes out a legacy to himself is not covered either by the words or by the spirit of the *senatus consultum.*

23 PAUL, *Punishments for Civilians, sole book:* What is forgery? It appears to be [forgery] if someone imitates another's handwriting, or tampers with, or copies a written document or accounts, but not [when] someone in his reckoning or accounting commits other types of misstatement.

24 SCAEVOLA, *Digest, book 22:* Aithales, a slave, to whom had been left by *fideicommissum* in the will of Betitus Callinicus his freedom and a share of the inheritance, [to be granted] by those appointed heirs to the [remaining] eleven parts of the estate, gave evidence to Maximilla, daughter of the testator and appointed heiress to one twelfth, that he could prove Betitus Callinicus's will to be a forgery. Having been interrogated by Maximilla in the presence of the magistrates, he declared that he would prove how the will had been falsified. And when Maximilla had brought a charge of forgery against the writer of the will and Proculus, a co-heir, the urban prefect after

the case had been heard declared that the will was not forged and ordered that Maximilla's twelfth should be taken by the imperial treasury. The question was raised: After this had taken place, had Aithales a right to his freedom and the *fideicommissum*? The opinion was given that they were due to him on the basis of the facts as stated.

25 ULPIAN, *Edict, book 7:* Anyone alleged to have provided false documents in the name of the praetor or to have issued a false edict is liable for cause to a penal *actio in factum,* although he may [also] be guilty under the *lex Cornelia.*

26 MARCELLUS, *Digest, book 30:* If anyone destroys his father's will and acts as heir as if [the father] had died intestate and then dies in his turn, it is entirely just that his heir should be deprived of his whole paternal inheritance.

27 MODESTINUS, *Rules, book 8:* It is a rule of law that those who give conflicting evidence should be liable as if they had committed forgery. 1. It is also laid down that a person who has given false evidence contrary to his own seal is liable to the penalty for forgery. There is no doubt that a person who gives different evidence to two different people and whose trustworthiness is thus equivocal and inconstant is liable to a charge of forgery. 2. A person who has acted as if he were a soldier, or used illegal marks of rank, or traveled the roads with a forged passport, is to be punished very severely according to the degree of his crime.

28 MODESTINUS, *Replies, book 4:* If on the day put forward by the debtor the contract of pledge is misrepresented by the creditor, there is scope for a charge of forgery.

29 MODESTINUS, *Problems Solved, sole book:* If anyone deceives the governor of a province, whether by means of official records or by the lodging of a [false] accusation, he achieves nothing. Indeed, if he is arraigned, he pays the penalty of his rash offense; for he is punished just as if he had committed forgery. There are rescripts on this point; however, it is enough, for the purposes of argument, to quote one whose words are these: "Alexander Augustus to Julius Marullus. If, after the laying of the accusation, your opponent has failed to include the truth in the petitions made by him, he may not make use of the document he signed; and indeed, if he be arraigned, one ought to inflict the penalty [on him]."

30 MODESTINUS, *Encyclopaedia, book 12:* A person is bound by the *lex Cornelia* on wills if he makes or engraves a counterfeit seal. 1. In the case of a substituted birth, only the parents, or persons affected by the matter, bring accusations; [it is] not for just any citizen to make a criminal accusation.

31 CALLISTRATUS, *Judicial Examinations, book 3:* The deified Pius wrote in a rescript to Claudius that sentence should be passed in accordance with the gravity of each offense on those who have produced before the judges legal documents which cannot be proved; or should it appear that they deserve more [punishment] than can be inflicted on them within the limits of the jurisdiction, the emperor should be sent a written note of the matter for him to consider how far they should be punished. However, the deified Marcus and his brother moderated this principle out of their humanity, so that if (as often happens) documents of this nature are laid before the court in error, those laying anything of the kind are pardoned.

32 MODESTINUS, *Punishments, book 1:* Nowadays, those who with malicious intent tamper with published edicts are inflicted with the penalty for forgery. 1. If a seller or a buyer tampers with the publicly approved measures of wine, corn, or any other thing, or commits a deception with malicious intent, he is sentenced to a fine of double the value of the thing concerned; and it was laid down by decree of the deified Hadrian that those who had falsified weights or measures should be relegated to an island.

33 MODESTINUS, *Punishments, book 3:* If anyone makes use of forged constitutions without authority, he is interdicted from fire and water under the *lex Cornelia.*

11

LEX JULIA ON EXTORTION

1 MARCIAN, *Institutes, book 14:* The *lex Julia* on extortion applies to those monies taken by anyone holding a magistracy, a position of power or administration, a legateship, or any other office, duty, or public employment, or while he is on the staff of any of these. 1. The law makes an exception for those from whom it is legitimate to accept [things], from cousins or blood relations of a closer degree or from a wife.

2 SCAEVOLA, *Rules, book 4:* This statute also admits an action against the heirs, provided that it be within one year of the death of the accused.

3 MACER, *Criminal Proceedings, book 1:* Under the *lex Julia* on extortion anyone is liable who, while holding any [position of] power, accepts money in return for giving or not giving a judgment or passing sentence,

4 VENULEIUS SATURNINUS, *Criminal Proceedings, book 3:* or for doing more or less than his duty.

5 MACER, *Criminal Proceedings, book 1:* Under this statute the companions of those holding judicial office are also liable to judgment.

6 VENULEIUS SATURNINUS, *Criminal Proceedings, book 3:* Under the same statute are liable those who accept money for giving or withholding evidence. 1. A person condemned under this law is prohibited from giving evidence publicly, from being a judge, or from bringing an accusation. 2. The *lex Julia* on extortion provides that no one is to accept cash for the appointing or posting of a soldier, nor to accept money to deliver his opinion in the senate or in any public council, or for lodging or not lodging an accusation; and that the urban magistrates shall refrain from all meanness and that they shall not accept any gift or favor in one year to the value of more than one hundred aurei.

7 MACER, *Criminal Proceedings, book 1:* The *lex Julia* on extortion lays down that no one shall take anything for the purpose of providing a judge or *arbiter*, or changing him, or ordering him to give judgment; nor for not providing, not changing, or not ordering him to give judgment; nor for throwing a man into the public prison, binding him, or ordering him to be bound, or releasing him from his chains; nor for condemning or acquitting any man; nor for assessing damages, or giving or not giving a judgment involving status or money. 1. However, it seems that the law allows the acceptance of an unrestricted amount from the excepted persons, but nothing at all, not even the smallest amount, from any of those set out in this chapter. 2. It is also provided that no credit is to be given for the carrying out of public works, for the giving, providing, or importing of corn for the public, or for the maintaining of buildings in good repair, before they are completed, approved, and answered for according to law. 3. Nowadays offenders under the law on extortion are punished *extra ordinem*, for the most part by exile, or some even harsher penalty, depending on what they have committed. What, then, if they accept money for killing a man, or, even if they have not accepted [money], are impelled by passion to kill an innocent man or one whom they ought not to have punished? They should suffer capital punishment, or at least deportation to an island, and most are punished in this way.

8 PAUL, *Edict, book 54:* Anything given to a proconsul or praetor in breach of the

statute on extortion cannot be usucapted. 1. The same statute voids sales or hirings made at a higher or lower price on those grounds, and prevents usucapion until the property returns to the control of him from whom it came, or of his heir.

9 PAPINIAN, *Replies, book 5:* Those who, after accepting money, have violated a duty publicly enjoined on them are accused on a charge of extortion.

12

LEX JULIA ON THE CORN SUPPLY

1 MARCIAN, *Institutes, book 2:* Legal proceedings have taken place between a slave and his master if the former states that the master has defrauded the public corn supply.

2 ULPIAN, *Duties of Proconsul, book 9:* The *lex Julia* on the corn supply lays down a penalty for the man who does something prejudicial to the corn supply or who enters into a partnership with the intention of putting up the price of the corn supply. 1. The same statute contains a provision that no one is to hold back a ship or a ship master or to do anything with malicious intent by which they may be delayed. 2. And a penalty of twenty aurei is laid down.

3 PAPIRIUS JUSTUS, *Imperial Constitutions, book 1:* The Emperors Antoninus and Verus, Augusti, wrote a rescript in these words: "It is grossly unjust for the decurions to sell grain to their citizens more cheaply than the corn supply requires." 1. The same emperors wrote in a rescript that it is not lawful for the *ordo* [of decurions] of any *civitas* to lay down the price of any grain which is found. Again, they wrote the following words in a rescript: "Even if women do not customarily bring this type of accusation, still, because you promise to produce evidence of matters which relate to the use of the corn supply, you have authority to inform the prefect of the corn supply."

13

LEX JULIA ON EMBEZZLEMENT [OF PUBLIC MONEY], ON SACRILEGE, AND ON MONEYS REMAINING

1 ULPIAN, *Sabinus, book 44:* It is provided by the *lex Julia* on embezzlement [of public money] that no one is to take [anything] away from any money dedicated to sacred or religious or public purposes, nor divert it, nor to convert it to his own use, nor to make it possible for anyone else to take away, divert, or convert it, unless he is a person to whom this is permitted by statute. Nor is anyone to put anything into, or mix anything with, the gold, silver, and bronze [which is] public [property], so as to debase it, nor, knowingly and with malicious intent, to make possible such an addition or mixing.

2 PAUL, *Sabinus, book 11:* A person is liable under the *lex Julia* on moneys remaining if he has retained public money entrusted to him for a particular purpose and has not used it all up for that purpose.

3 ULPIAN, *Adulteries, book 1:* The penalty for embezzlement [of public money] includes interdiction from fire and water, which has today been succeeded by deportation. In addition, anyone who is reduced to this status forfeits his property as well as all his former legal rights.

4 MARCIAN, *Institutes, book 14:* A person is liable under the *lex Julia* on embezzlement [of public money] if he takes away or intercepts any money dedicated to sacred or religious purposes. 1. Also, anyone who removes something given to an immortal god is liable to the penalty for embezzlement [of public money]. 2. It is laid down further in the [imperial] mandates on sacrilege that provincial governors are to track down those who commit sacrilege, brigands, and kidnappers, and punish each according to the degree of his offense. And it is so provided in the constitutions, that those who commit sacrilege are to be punished with a fitting penalty *extra ordinem.*

5 (4,3) MARCIAN, *Institutes, book 14:* A person is liable under the *lex Julia* on moneys remaining if there remains in his possession public money as the result of a lease, a purchase, the provision of foodstuffs, or some other purpose. 1(4). In addition, anyone who receives public money for any purposes and does not pay it out but keeps it is liable under this law. 2(5). A person found guilty under this statute is fined one third more than the amount he owes. 3(6). Treasure trove does not become *religiosus* from the place where it is found; for even if it is found in a [funeral] monument it is not carried off as if *religiosus*. For that which a person is forbidden to inter he cannot make *religiosus*; and, as is provided in the imperial mandates, money cannot be interred. 4(7). But also, if someone abstracts anything from the property of a *civitas*, it is provided in the constitutions of the deified Emperors Trajan and Hadrian that the offense of embezzlement [of public money] is committed; and we follow this law.

6 (5) MARCIAN, *Rules, book 5:* The deified Severus and Antoninus wrote in a rescript to Cassius Festus that if the property of private individuals is stolen from a building dedicated to the gods in which it has been lodged, there is an action for theft, not for sacrilege.

7 (6) ULPIAN, *Duties of Proconsul, book 7:* The proconsul ought to impose the penalty for sacrilege more or less severely, depending on the status, age, and sex of the person, the nature of the property, and the time. I know indeed that many have been condemned to the wild beasts for sacrilege, some even burned alive, and others hanged on the gallows. But the penalty should be tempered to restrict condemnation to the beasts to those who have formed a band, broken into a temple, and carried off from there the god's offerings by night. But he who in the daytime takes an article of moderate value from a temple should be punished by sentence to the mines, or, if he was born to a higher position, he should be deported to an island.

8 (6,1) ULPIAN, *Duties of Proconsul, book 7:* Public slaves who, while employed in the mint, stamp for themselves money outside the premises with the public die, or who steal stamped coin, are not regarded as engaging in forgery of the coinage, but as having committed a theft of public money, a charge which is assimilated to that of embezzlement [of public money]. 1(2). Should anyone have stolen gold or silver from the imperial mines, he is punished under an edict of the deified Pius by exile or condemnation to the mines, according to his rank. Further, he who provides a hiding place for the thief is just as liable as if he had been found guilty of manifest theft, and is made infamous. Anyone who unlawfully possesses gold from a mine and melts it down is condemned to a penalty of four times its value.

9 (7) VENULEIUS SATURNINUS, *Criminal Proceedings, book 2:* A charge of embezzlement [of public money] ought not to be brought in respect of an act committed more than five years previously.

10 (8) VENULEIUS SATURNINUS, *Criminal Proceedings, book 3:* Anyone who takes down the bronze tablet of a law or an official map [of the distribution] of lands or [a tablet] containing anything else or alters any part of it is liable under the *lex Julia* on embezzlement [of public money]. 1. Anyone who makes a deletion from or addition to the public records is liable under the same statute.

11 (9) PAUL, *Criminal Proceedings, sole book:* Those who commit sacrilege suffer capital punishment. 1. Sacrilege is committed by those who have pillaged sacred things which belong to the public. However, persons who have laid hands on sacred things in private possession, or on petty shrines without guards, deserve a heavier

penalty than [simple] thieves but a lighter one than those guilty of sacrilege. For this reason, you must consider carefully the nature of the sacred object or whether the deed incurs a charge of sacrilege. 2. Labeo, in the thirty-eighth book of his *Posthumous Works*, defines embezzlement [of public money] as a theft of money belonging to the public or the gods above, carried out by some person who was not responsible for it, and accordingly a temple caretaker [can]not commit embezzlement [of public money] in respect of the property delivered to his care. 3. Later in the same chapter, [Labeo] writes that not only public but also private money can give rise to a charge of embezzlement [of public money], if someone pretending to be a creditor of the imperial treasury has received money owing to it, even though the money that he took was private. 4. However, a person who takes money for the purpose of passing it on or any other person who has responsibility for the money does not commit embezzlement [of public money]. 5. The senate has ordered that those persons should be liable under the law on embezzlement [of public money] who, without the orders of the person in charge, give permission for the inspection and transcription of public records. 6. Labeo has written in the thirty-eighth book of his *Posthumous Works* that a person who has retained public money intended for any purposes and not spent it is liable under this law. He states that an action for moneys remaining does not, however, lie against a person who, on leaving his province, retains the money which was in his possession after making his return to the state treasury, because he [now] owes it to the imperial treasury as a private person, and is therefore classed among its debtors; and the person who enjoys this office shall exact it from him, that is, by taking a pledge, by detaining his person, or by imposing a fine. However, the *lex Julia* on moneys remaining has ordered that after one year, this money also shall be treated as remaining.

12 (10) MARCIAN, *Criminal Proceedings, book 1:* A person is liable under this law if he writes down in the public records a smaller sum than the actual proceeds of a sale or public letting, or does anything else of the kind. 1. When a young man of senatorial family had been found to have placed a small chest in a temple and to have shut inside it a man who, after the temple had closed, got out of the chest, stole a great deal of property from the temple, and climbed back into the chest again, the deified Severus and Antoninus after his conviction deported him to an island.

13 (11) ULPIAN, *Edict, book 68:* A person who bores holes through the walls of a temple or takes anything thence is liable to an action for embezzlement [of public money].

14 (12) MARCELLUS, *Digest, book 25:* There is no question of embezzlement [of public money] being committed if I demand money from a person who is debtor to both myself and the imperial treasury; for there is no diversion of the treasury's money by taking this away from its debtor, since he remains the treasury's debtor no less [than before].

15 (13) MODESTINUS, *Punishments, book 2:* A person who has stolen booty captured from the enemy is liable under the statute on embezzlement [of public money] and is condemned to pay four times the amount.

16 (14) PAPINIAN, *Questions, book 36:* Criminal proceedings for embezzlement [of public money] and for monies remaining and for extortion are likewise brought against the heir; nor is this unjustified, since in these cases the main issue relates to the money taken.

14

THE *LEX JULIA* ON ELECTORAL CORRUPTION

1 MODESTINUS, *Punishments, book 2:* This law is nowadays of no effect in Rome, since the creation of magistrates is a matter for the attention of the emperor and not for the favor of the people. 1. But if anyone in a municipality seeks a magistracy or a priesthood contrary to this statute, he is punished by *senatus consultum* with a fine of one hundred aurei and with *infamia.* 2. Should a person condemned under this statute convict another person, he is restored to his previous status, but does not recover his money. 3. Again, he who introduces a new tax is by *senatus consultum* inflicted with the same penalty. 4. And if anyone, accused or accuser, enters the judge's house, by the *lex Julia judiciaria* he commits an offense against the law on electoral corruption, that is, he is ordered to pay one hundred aurei to the imperial treasury.

15

LEX FABIA ON KIDNAPPERS

1 ULPIAN, *Rules, book 1:* If a buyer knowingly buys a freeman, this gives rise to a capital charge against him under the *lex Fabia* on kidnapping, to which the seller also is liable if he sells him knowing him to be free.

2 ULPIAN, *Duties of Proconsul, book 9:* You should know that the *lex Fabia* does not apply to those who have sold absent slaves whom they own; for it is one thing to be absent and another to be on the run. 1. Again, it does not apply to a man who has given a mandate that a runaway slave be pursued and sold off; for he has not sold him in flight. 2. To put it more fully, if someone gives a mandate to Titius that he is to seize a runaway slave so that, if he has seized him, he may treat him as having been bought, the *senatus consultum* does not apply. 3. However, this *senatus consultum* also covers masters who sell their slaves while in flight.

3 MARCIAN, *Criminal Proceedings, book 1:* A bona fide *possessor* is not liable to a charge under the *lex Fabia* of concealing a slave, that is, someone who was unaware that the slave was another's and thought that he was acting at the master's wish. The statute itself is drafted thus concerning the bona fide *possessor*; for it adds "if he does so knowingly, with malicious intent"; and it was very frequently laid down by the Emperors Severus and Antoninus that bona fide *possessores* are not to be liable under this statute. 1. One must not omit [to mention] that, as in the case of the *lex Aquilia,* if the one on whose account a person has committed an offense under the *lex Fabia* dies, the charge, and the penalty under the *lex Fabia,* survive, as the deified Severus and Antoninus wrote in a rescript.

4 GAIUS, *Provincial Edict, book 22:* Under the *lex Fabia* someone is liable who knowingly makes a gift of a freeman or gives him as a dowry; again, he who for any of those reasons accepts him, knowing him to be a freeman, should be regarded as in the same category as the seller and buyer. It is the same if property be given in exchange for him.

5 MODESTINUS, *Replies, book 17:* The opinion was given that a person who is shown to have received and concealed another's runaway slave could have very little chance of avoiding the charge, if it were proved, on the grounds that he was raising the question of ownership.

6 CALLISTRATUS, *Judicial Examinations, book 6:* A person is not immediately to be [reckoned as] a kidnapper because he is liable to a charge of theft for appropriating other men's slaves, as the deified Hadrian wrote in a rescript, in these words: "Whether

the man who entices or steals others' slaves is liable to the charge of kidnapping brought against him or not is a question of fact; and, therefore, the correct course is not to consult me, but the judge should follow what is found to be most true in the matter before him. It should, however, be clearly understood that a person can be liable to a charge of theft for stealing others' slaves without immediately being reckoned a kidnapper on that account." 1. The same emperor wrote in a rescript on the same subject in the following words: "The man on whose premises are found one or two runaway slaves who have hired out their services for food, particularly if they have previously done such work for others, cannot rightfully be called a concealer [of another's slave]." 2. It is laid down by the *lex Fabia* that a freeman who hides another, freeborn or freed, against his will, or keeps him in fetters or buys him, knowingly and with malicious intent, or who is an accomplice in any of these things, and anyone who persuades another's slave, male or female, to run away from his master or mistress, or conceals him or her against the will or without the knowledge of the master or mistress, or keeps him in fetters, or buys him, knowingly and with malicious intent, or who is an accomplice in the matter, is liable to the penalty [of the statute].

7 HERMOGENIAN, *Epitome of Law, book 5:* The money penalty laid down by the *lex Fabia* has fallen out of use; for those detected in this crime are punished according to the degree of their wrongdoing, and are mostly condemned to the mines.

16

SENATUS CONSULTUM TURPILLIANUM AND THE ANNULMENT OF CHARGES

1 MARCIAN, *The Senatus Consultum Turpillianum, sole book:* Rashness in accusers is revealed in three ways and subject to three penalties: they may calumniate, prevaricate, or tergiversate. 1. Calumny is the bringing of false charges, prevarication the concealment of genuine ones, while tergiversation means the complete abandonment of accusations [once made]. 2. Calumniators are subjected to the penalty of the *lex Remmia*. 3. It is, however, not the case that a person who fails to prove what he set out to do is forthwith regarded as a calumniator; for the investigation of that matter is entrusted to the discretion of the judge in the case who, on the acquittal of the accused, begins to look into the intention of the accuser and the state of mind which led him to bring the accusation. If he finds that there was a reasonable mistake on his part he clears him; but if he catches him in a manifest calumny, he inflicts the penalty of the law on him. 4. Which of the two [verdicts he reaches] is made clear by the words themselves of his pronouncement. For if, indeed, he pronounces, "you have not proved [your case]," he has acquitted him; but if, on the other hand, he pronounces, "you have committed calumny," he has condemned him. And although the judge makes no suggestion of penalty, the power of the statute will still be exercised against him; for, as Papinian said in an opinion, a question of fact is at the judgment of the person conducting the trial, but the infliction of punishment is not left to his discretion but is reserved for the authority of statute. 5. The question may be asked whether, if the judge's decision is in the words: "Lucius Titius appears to have brought a rash accusation," he would seem to have pronounced him a calumniator. Papinian['s view is that] the heedlessness of his fluency contains [grounds for] a pardon, that his sudden heat lacks the essential fault of calumny and that on this account he should not suffer any penalty. 6. The prevaricator we demonstrate to be the man who colludes with the accused and discharges his duty of accusation negligently by concealing his own proofs and accepting the accused's spurious defenses. 7. If anyone drops an accusation short of its annulment, he is punished. 8. It is customary for annulment in a private capacity to be

sought and obtained from the provincial governor, and in court, not unofficially; nor can the judge hand over this jurisdiction to another. 9. If the same [accuser] has brought several charges against the same [accused], he must seek their annulment individually; otherwise, on account of any he omits he will suffer the penalty of the *senatus consultum*. 10. An accusation has been brought by a man who could have been barred by prescription, such as someone proceeding for adultery against the man after the five years next following the date of the act of adultery, or against the woman after the six available months from the date of the divorce; there is [then] a nice doubt whether, if he drops his accusation, he should be punished under this *senatus consultum*. It is relevant that there will be practically no accusation which lapse of time or defect of person would totally remove, and which would offer the accused immunity from fear and risk. On the other hand, it is also relevant that any type of accusation once brought must be annulled by the authority of the judge, not at the wish of the accuser, and [that] the man who had rashly proceeded to so shameless an accusation should be reckoned as deserving of greater odium. The more correct view, therefore, is that he of whom we are speaking ought also to fall under the *senatus consultum*. And yet Papinian gave an opinion that a woman, who on account of her sex was not allowed to bring an accusation of fraud since she was not pursuing her own wrong or that of her family, was on dropping [the accusation] not liable to punishment under the *senatus consultum Turpillianum*. Would he then have given the same opinion in other cases also? For what difference does it make if the reason for barring a person from some accusation is the infirmity of their sex or the turpitude of their condition, or the ending of the time period? [The last two groups] are much more to be excluded [from the scope of the *senatus consultum*], in that a woman's accusation, at least if it relates to her own grief, could have effect, while the accusation of those others is brought into play only so far as to be voiced. And yet the same [Papinian] writes elsewhere that a person cannot bring simultaneous accusations of adultery against two persons, male and female; yet if he were to denounce both at the same time, he must seek the annulment [of the charge] against each if he is to avoid falling under this *senatus consultum*. What then is the difference between an accusation that is invalid for the reasons stated above, and one which is not sustained because of the number of persons concerned? May these be the points of difference: that though one person has full competence to bring an accusation, he may be barred from a [particular] accusation by having accused the pair together; or, on the other hand, on a strict construction, may the power to accuse [simply] not be available to certain persons? Therefore, it must rightly be said that everyone, with the exception of a woman or a *minor*, unless he seeks the annulment [of his accusation], falls under this *senatus consultum*. 11. An accusation of a tutor who is suspect can be examined only before the court, and no person other than the governor can pronounce sentence in proceedings of this nature; furthermore, anyone who drops [such an accusation] is not liable under the *senatus consultum*. 12. Again, if anyone alleges that [another] has fallen under the *senatus consultum Turpillianum*, this is for the governor to take cognizance of; but if he abandons [this allegation] the punishment of the *senatus consultum* does not apply against him, since a person who alleges that anyone has fallen under this *senatus consultum* is not an accuser. 13. A person does fall under the *senatus consultum* if he puts up or institutes an accuser, or if he commissions another and arranges for him to bring a capital accusation, by giving him proofs and furnishing him with charges. And rightly so; for by his lack of belief in the charge he is prompting and by his action in removing himself from the risk of calumny or desertion, he has rightly deserved to suffer the penalty of a calumniator and deserter, unless the person whom he suborned to bring the accusation proves the charge that he set out to do. Nor does it matter whether he commissioned the accusation himself or through the agency of another; indeed, Papinian gave an opinion that he who makes use of such services to commission an accusation is to be punished under the spirit, though not the words, of the *senatus consultum*. The suborned accuser is similarly punished under the same *senatus consultum*, that is, he is punished for the sole reason that he accepted a commission to put a third party in fear. 14. A convicted accused has lodged an appeal, and subsequently his accuser has dropped the charge; is [the latter] liable under this *senatus consultum*? It almost seems that he is, because the sentence of condemnation is annulled by the remedy of the appeal.

2 PAUL, *Punishments under All the Statutes, sole book:* A person who has dropped [a charge] is forbidden to proceed further and lay an accusation.

3 PAUL, *Views, book 1:* In private indictments as in accusations *extra ordinem* all persons guilty of calumny are punished *extra ordinem* according to the degree of their offense.

4 PAPINIAN, *Replies, book 15:* A woman who, after the lodging of her accusation, has dropped and abandoned a charge of forgery involving her own wrong does not appear to be bound by the *senatus consultum Turpillianum.* 1. After an annulment, the same charge cannot be instituted by the same person against the same [accused].

5 PAUL, *Replies, book 2:* Is a person who, in a complaint presented to the emperor, has threatened to bring a charge of forgery liable under the *senatus consultum Turpillianum,* should he have failed to do so? Paul gave the opinion that the man in question was not covered by the words of the *senatus consultum Turpillianum.*

6 PAUL, *Views, book 1:* A person has dropped an accusation if he discusses with his opponent the compromising of the charge which he was bringing. 1. A person has dropped an accusation deliberately if he has laid aside the state of mind and intention of bringing that accusation. 2. A person appears to have dropped [his accusation] if he fails to carry through proceedings against the accused within the time prescribed for the accusation by the governor. 3. Informers who lay informations by means of a written statement notifying a crime are required to stand by their written statements. 4. Those who are alleged to have sought out or written or brought before the court any written matter, evidence, or anything else to anyone's peril are punished for their calumny.

7 ULPIAN, *Disputations, book 8:* If anyone should wish to resume an accusation following a general amnesty, he does so on the same legal grounds on which he brought his earlier accusation; for prescriptions may not be brought forward against him which were not brought forward before the amnesty of accused persons. The deified Hadrian also wrote to this effect in a rescript. 1. If anyone brings a charge of fraud, or of the despoliation of an inheritance, and drops it, he will not undergo the penalty of the *senatus consultum Turpillianum,* nor if [the charge be] of theft or *injuria;* but it will be the function of the judge to punish his fault.

8 PAPINIAN, *Adulteries, book 2:* An annulment takes place, either publicly on the day of some happy event or general thanksgiving,

9 MACER, *Criminal Proceedings, book 2:* Or of some affair which has been brought to a successful conclusion,

10 PAPINIAN, *Adulteries, book 2:* or privately at the request of the pursuer. In a third category there is annulment according to statute, where the accuser has died or for good cause there is some other hindrance whereby he cannot bring an accusation. 1. However, after the making of a public annulment the court will not refuse someone prosecuting again with a husband's right. 2. The deified Trajan explained that thirty days were to be available for renewing the action against the accused, that is, from the day on which the holiday ended. And the senate considered that [only] those days run on which anyone can renew the action against the person accused by him. For this time for renewing the action against the accused only runs if the accuser also was able to be present [in court].

11 PAPINIAN, *Adulterers, sole book:* The question used to be asked whether those who

had been barred from making accusations by reason of time fell under the *senatus consultum Turpillianum.* He gave the opinion that there should be no doubt that those who had been unable to bring an action for adultery because they were barred by prescription of time could not be punished for calumny.

12 ULPIAN, *Adulteries, book 2:* On the occurrence of a general annulment by *senatus consultum* as is customary, whether because of some festivity, or the honoring of a consecrated temple, or some other reason which led the senate to decide that there should be an amnesty for accused persons, if someone does not renew his action against the accused within the appointed day, it must be said that the *senatus consultum Turpillianum* ceases [to have effect]. For a person is not seen as dropping [his accusation] if he does not accuse a defendant who has been exempted [in this way]; and by the occurrence of the annulment there is exemption for accused persons.

13 PAUL, *Adulterer, book 3:* We shall agree that a man has dropped [his accusation] who has completely given up the intention of carrying on with it, [but] not he who has postponed the accusation. 1. However, a person who has dropped his accusation with the permission of the emperor goes unpunished.

14 ULPIAN, *Duties of Proconsul, book 7:* The deified Hadrian wrote in a rescript to Salvius Carus, proconsul of Crete, that a tutor who had instituted an accusation on behalf of his pupil should not be compelled to go through with it on the death of the pupil on whose behalf he had commenced the accusation.

15 MACER, *Criminal [Proceedings], book 2:* Persons fall under the *senatus consultum Turpillianum* who have suborned accusers, or made accusations after having been suborned and have not carried through proceedings against those charged, or have dropped an accusation otherwise than because an annulment has been granted; and who have given a promissory note in return for the making of an accusation, or concluded any kind of agreement. It should be stated that the phrase "and have not carried through" [their accusations] relates to all the above-mentioned persons. 1. Does the *senatus consultum* apply to those who nowadays conduct criminal proceedings *extra ordinem*? But the legal principle, based on imperial constitutions, that we now use, applies in such a way that individual penalties are imposed in individual cases. 2. It is provided by the constitutions that those persons against whom an action for calumny is not allowed, do not incur the penalty of this *senatus consultum* if they should drop an accusation. 3. If the accuser drops [his charge] because of the death of the accused, he cannot be liable under this *senatus consultum,* because the case is discharged by the death of the accused, unless the crime was of such a kind that an action survives against the heirs, for example [a charge] of treason. The same is true of an accusation of extortion, because this too is not discharged by death. 4. However, if the accused dies after his accuser has dropped [the case], the accuser's fault is not the more removed by this. Severus and Antoninus laid down that a person who has once dropped [his accusation] should not be given a hearing if he should subsequently be prepared to bring the accusation. 5. Those who, after laying an accusation in writing [but] before issue is joined, are not able to raise the action within one or two years because their attention is engaged elsewhere by various gubernatorial duties or even by the requirements of civil office, do not fall under the *senatus consultum.* 6. Although a person had accused a defendant beforehand, if, following an annulment but before he could resume the action against the accused another annulment occurs, the thirty days are reckoned from the date of the second, not the first annulment.

16 PAUL, *Adulterers, sole book:* Domitian wrote in a rescript that what is stated about holidays and the amnesty of accused persons does not apply to slaves, who, when accused, are commanded to be kept in chains until their trial is concluded.

17 MODESTINUS, *Replies, book 17:* Lucius Titius accused Seius of forgery and, before

he had carried through the case to the end, the charges were annulled under an amnesty for accused persons. My question is: does he fall under the *senatus consultum Turpillianum* if he subsequently fails to accuse him again? Herennius Modestinus gave the opinion that an amnesty for accused persons, which is a public concession, does not relate to this type of charge.

18 PAPIRIUS JUSTUS, *Constitutions, book 1:* The Emperors Antoninus and Verus, Augusti, wrote in a rescript to Julius Verus, when he was alleged to have pursued a lawsuit for a fairly long time, that he could not accept an annulment against the wishes of his opponent. 1. They further wrote that unless there was clear proof of the opponent's agreement, an annulment would not be granted. 2. They further wrote that although he alleged that an amendment had been applied for in a capital charge as though it were a pecuniary matter, nevertheless, the inquiry should be re-opened so that if he had not proved what he claimed, he should not go unpunished.

17

WANTED PERSONS OR THOSE WHO MAY BE CONDEMNED IN THEIR ABSENCE

1 MARCIAN, *Criminal [Proceedings], book 2:* The deified Severus and Antoninus the Great wrote in a rescript that no one should be punished in his absence; and we apply this rule, that absent persons should not be condemned; for the argument of justice does not permit of a person's being condemned without his case being heard. 1. If, however, someone is to be punished more severely, say [by condemnation] to the *opus metalli* or something of the kind, or to a capital penalty, in this event the penalty should not be inflicted on an absent person, but the absent one should be searched for and registered [among the accused] so that he may take the opportunity [of defending] himself. 2. Provincial governors, however, as regards wanted persons who have been registered, must act as follows: They must order by edict those whom they have registered to attend, so that it may come to their notice that they have been registered; and [the governors] must also send letters to the [local] magistrates where [the wanted persons] reside so that by their agency it can become known that the wanted men have been registered. 3. And the one-year period for them to clear themselves is reckoned from this time. 4. And Papinian, in the sixteenth book of his *Replies*, has written that if a wanted person who has been registered attends before the provincial governor within the year and gives satisfaction, there is no scope for orders that his property be forfeit to the imperial treasury. For if he were to die within the year, the charge against him expires and lapses, and his property passes to his successors.

2 MACER, *Criminal [Proceedings], book 2:* The period of one year applies to taking possession of the property of a wanted person who has been registered. 1. But if the imperial treasury fails to take possession of the property during the space of twenty years, it will thereafter be barred by prescription [from taking possession] either from the accused himself or from his heirs.

3 MARCIAN, *Criminal Proceedings, book 2:* For it was the wish of the deified emperors that any sort of dispute involving the imperial treasury, if there were no other specific prescription, should be barred by twenty years' silence.

4 MACER, *Criminal Proceedings, book 2:* The year is to be reckoned from the time when the registration which relates to the wanted man became public knowledge,

either by edict or by letters addressed to the magistrates. 1. The imperial treasury's twenty years are therefore also counted from the time when the registration became public knowledge. 2. Finally, it should be noted that by no lapse of time may a wanted person who is registered be barred from defending his case.

5 MODESTINUS, *Encyclopaedia, book 12:* It is provided in mandates that within the year the property of wanted persons is [to be] sealed up, so that if they return and clear themselves they may have their property intact; if they neither reply nor have anyone to enter a defense on their behalf, then at the end of the year their property is collected for the imperial treasury. 1. Again, within the one-year period, if in the meantime there are any items of automotive property, the deified Severus and Antoninus have confirmed that they should be sold and the proceeds placed on deposit, so that they may not deteriorate by the delay or perish in any way. 2. The deified Trajan wrote in a rescript that fruits are also to be classed with automotive property. 3. Care must, however, be taken that a person who has absconded does not meantime receive any payments from his debtors, lest in this way means be furnished for him to flee.

18

INVESTIGATIONS

1 ULPIAN, *Duties of Proconsul, book 8:* It is customary for torture to be applied to unearth crimes; but let us see when and how far this should be done. The deified Augustus laid down that one should not begin with the application of pain, and that reliance should not be placed entirely on torture, as is contained also in the deified Hadrian's letter to Sennius Sabinus. 1. The words of the rescript are as follows: "Recourse should only be had to the infliction of pain on slaves when the criminal is [already] suspect, and is brought so close to being proved [guilty] by other evidence that the confession of his slaves appears to be the only thing lacking." 2. The deified Hadrian wrote the same in a rescript to Claudius Quartinus; in which rescript he stated that a start should be made with the most suspect person and the man from whom the judge believes that he can most easily learn the truth. 3. It is declared in a rescript issued by the deified brothers to Lucius Tiberianus that persons produced by the accuser from his own household should not be summoned to the torture, nor should it readily be believed that she whom both her parents are said to have treated as their beloved daughter is a slave. 4. The same [emperors] sent a rescript to Cornelius Proculus that reliance should certainly not be placed on the torture of a single slave, but that the case should be examined by proofs. 5. The deified Antoninus and the deified Hadrian to Sennius Sabinus wrote in rescripts that when slaves were alleged along with their master to have sent gold and silver out of the country, they should not be questioned about the master in case they should of their own accord say something which would prejudice him. 6. The deified brothers wrote in a rescript to Lelianus Longinus that torture should not be applied to a slave belonging to an heir in matters concerning the inheritance, even though it had been suspected that the heir appeared to have sought the right of ownership over that [slave] by means of an imaginary sale. 7. It has very frequently been written in rescripts that a slave belonging to a municipality [may] be tortured in capital cases affecting the citizens because he is not their slave but the state's, and the same should be said of other slaves belonging to corporate bodies; for the slave appears to belong, not to a number of individuals, but to

the body [itself]. 8. Should a slave serve me in good faith, even though I have not acquired actual ownership over him, it can be said that he should not be tortured in a capital case affecting me. The same applies to a freeman who serves in good faith. 9. It is also laid down that a freedman is not [to be] tortured in a capital case affecting his patron. 10. Nor indeed, as our emperor and his deified father wrote in a rescript, should a brother [be tortured] in [a capital case affecting] his brother, adding the reason that a person should not be tortured [to give evidence] against someone against whom he [can]not be compelled to give evidence against his wish. 11. The deified Trajan wrote in a rescript to Sernius Quartus that a husband's slave could be tortured in a capital case affecting his wife. 12. The same [emperor] wrote in a rescript to Mummius Lollianus that the slaves of a condemned man, because they have ceased to be his property, can be tortured [to give evidence] against him. 13. The deified Pius wrote in a rescript that if a slave is manumitted to avoid his being tortured, then, provided that he is not tortured in a capital case affecting his master, he can be tortured. 14. The deified brothers also wrote in a rescript that a [slave] who at the outset of a trial was the property of another, even if he subsequently becomes the property of the accused, can be tortured in a capital case against the latter. 15. If [a slave] should be said to have been bought invalidly, he cannot be tortured until it has been established that the sale was of no effect, according to a rescript of our emperor and his deified father. 16. Again, Severus wrote a rescript to Spicius Antigonus as follows: "Since information under torture ought neither to be obtained from slaves against their masters, nor, if this is done, should it guide the counsel of the person who is to pronounce sentence, much less should informations laid by slaves against their masters be admitted." 17. The deified Severus wrote in a rescript that the confessions of accused persons should not be taken as equivalent to crimes established by investigation, if there were no [objective] proof to guide the conscience of the judicial examiner. 18. Although a certain person had been prepared to put down the price of a slave, so that the slave might be tortured [to give evidence] against his master, our emperor and his deified father did not allow it. 19. Should slaves be tortured as participants in a crime in their own right and confess something concerning their master to the judge, the deified Trajan wrote in a rescript that [the judge] should pronounce as the case requires. In this rescript, it is demonstrated that masters may be injured by their slaves' confessions. But subsequent constitutions show a retreat from this rescript. 20. In a case involving tribute, in which no one doubts that the sinews of the state are concerned, the consideration of the risk, which threatens capital punishment to a slave who is privy to a fraud, corroborates his declaration. 21. The person who is going to conduct the torture should not ask specifically whether Lucius Titius committed a homicide, but in general terms who did it; for the former seems rather the action of someone suggesting [an answer] than seeking [the truth]. And so the deified Trajan wrote in a rescript. 22. The deified Hadrian wrote a rescript to Calpurnius Celerianus in these words: "Agricola, the slave of Pompeius Valens, can be interrogated concerning himself. If under torture he should say more than this, it is taken as evidence against the accused, not as a fault in the interrogation." 23. It is stated in constitutions that reliance should not always be placed on torture—but not never, either; for it is a chancy and risky business and one which may be deceptive. For there are a number of people who, by their endurance or their toughness under torture, are so contemptuous of it that the truth can in no way be squeezed out of them. Others have so little endurance that they would rather tell any kind of lie than suffer torture; so it happens that they confess in various ways, incriminating not only themselves but others also. 24. Moreover, you should not place confidence in torture applied to [a person's] enemies, because they readily tell lies. Not, however, that [all] confidence in torture should be lost where enmity is alleged. 25. And it is [only] when the case has been investigated [that you will know] whether you can have confidence or not. 26. There is found in a number of rescripts [the principle] that when someone has betrayed brigands, reliance should not be placed on the latter's [accusations] against those who betrayed them; but in certain [rescripts] that deal with the subject more fully there is the proviso that you should neither make it a rigid rule not [to rely on them], nor rely on them as you would in the case of other witnesses; but when the case has been examined, it should be considered whether to trust them or not. For most people, when they fear that [others], on being arrested, may perhaps name them, are accustomed to betray those [others first] as it were clutching at immunity for themselves; for it is not easy to believe those who inform on their own betrayers. But immunity should not indiscriminately be allowed to those making betrayals of this kind, nor should the [counter] allegations of those who say that they were accused solely because they themselves had handed over men [who have now denounced them] be disregarded; nor should any argument that they put forward of falsehood or calumny deployed against them [necessarily] be treated as invalid. 27. If a person should confess to wrongdoing of his own accord, he should not always be believed; for sometimes people confess out of fear or for some other reason. There is extant a letter of the deified brothers to Voconius Saxa, in which is contained the principle that a man should be freed who had made a confession against himself but who, after condemnation, had been found to be innocent. Its words are as follows: "My dear Saxa, you have acted prudently and with the excellent motive of humanity in condemning the slave Primitivus, who had been suspected of fabricating [a confession of] homicide against himself for fear of going back to his master and was persisting in his false evidence, with the aim of interrogating him about the accomplices whom he had equally mendaciously declared himself to have, so that you could get a more reliable confession than his about himself. Nor was your prudent scheme in vain, since under torture it was established that they had not been his accomplices and that he had rashly told lies about himself. You can, therefore, set aside the verdict and by virtue of your office order him to be sold off with the proviso added that at no time is he to return to the power of his master, who, we are advised, now that he has received compensation will gladly be rid of such a slave." By this letter it is indicated that a seemingly condemned slave, if he be reinstated, will be the property of him who owned him before he was condemned. A provincial governor, however, does not have the power to reinstate a person whom he has condemned, since he does not [even] have the power to revoke his own imposition of a fine. What then [must he do]? He should write to the emperor if at any time proof of innocence is subsequently established for a person who had appeared to be guilty.

2 ULPIAN, *Edict, book 39:* As long as there is doubt about the ownership of the property the slaves of an inheritance cannot be tortured in a capital case affecting their master.

3 ULPIAN, *Edict, book 50:* By a constitution of our emperor and the deified Severus, it was settled that a slave who belongs to a number of persons cannot be tortured in a capital case affecting any one of them.

4 ULPIAN, *Disputations, book 3:* As Papinian stated in an opinion, and as is laid down by rescript, in a case of incest the torturing of slaves is not applicable, since the *lex Julia* on adultery also does not apply.

5 MARCIAN, *Institutes, book 2:* If anyone has sexual relations with a female relative, whether a widow or married to another, with whom he cannot contract a marriage, he is to be deported to an island, since his crime is twofold: both incest, because he has violated a kinswoman contrary to what is lawful, and adultery, or *stuprum.* Finally, in this case, slaves are liable to torture [to give evidence] against their master's person.

6 PAPINIAN, *Adulteries, book 2:* When a father or husband is bringing an action for adultery and they request the torturing of the slaves of the accused, then, if an acquittal should follow after the case has been wound up and the witnesses produced, an assessment is made of the value of the slaves who have died; however, if a condemnation follows, the surviving [slaves] are forfeit to the state. 1. When there is an investigation into a forged will, the slaves of the inheritance can be tortured.

7 ULPIAN, *Adulteries, book 3:* The prevailing view is that it is the duty of the judges to weigh the degree of torture; for the torture should be so conducted that a slave survives, whether for acquittal or punishment.

8 PAUL, *Adulterers, book 2:* An edict of the deified Augustus, which he issued to the consuls Vibius Habitus and Lucius Apronianus, is extant as follows: "I do not think that interrogations under torture ought to be requested in every case and person; but when capital or more serious crimes cannot be explored and investigated in any other way than by the torturing of slaves, then I think that those [interrogations] are the most effective means of seeking out the truth and I hold that they should be conducted." 1. A *statuliber* can be cited in a case of adultery for examination under torture, because he is the slave of the heir; but he will retain his hope [of freedom].

9 MARCIAN, *Criminal Proceedings, book 2:* The deified Pius wrote in a rescript that interrogation under torture may be applied to slaves in a case involving money, if the truth cannot be found in any other way. The same provision is found in other rescripts. But it is the case that torture may not readily be applied in a matter involving money; but if the truth cannot be found otherwise than by physical pains, then it is permissible to use torture, as the deified Severus also wrote in a rescript. Therefore, it is lawful to torture the slaves of other persons also, if the case so suggests. 1. In those cases, where the torture of slaves against their masters should not be employed, it has been stated that not even interrogation [without torture] is valid; much less admissible are [voluntary] informations laid by slaves against their masters. 2. The deified Pius wrote in a rescript that a person who has been deported to an island should not be interrogated under torture. 3. Neither is a *statuliber* to be tortured in cases involving money, unless the condition [on which he is to be freed] is not satisfied.

10 ARCADIUS CHARISIUS, *Witnesses, sole book:* A person below the age of fourteen is not to be interrogated under torture, as the deified Pius wrote in a rescript to Caecilius Juventianus. 1. But all persons without exception are subject to torture if they are called to give evidence, when the case requires it, in a charge of *majestas*, because it touches on the persons of the emperors. 2. It is possible to ask whether interrogation under torture cannot be applied to the slaves of a son's *peculium castrense* in a capital case affecting his father; for it is laid down that the father['s slaves] ought not to be tortured [to give evidence] against the son. I think it is correctly stated that neither ought the son's slaves to be interrogated in a capital case affecting his father. 3. Tortures, however, are not to be applied to whatever extent the accuser demands, but as the due measure of well-regulated reason requires. 4. Nor should the accuser make a beginning of his proofs from the household of the accused, calling the freedmen or slaves of him whom he is accusing to give evidence. 5. Again, in sifting out the truth, the actual voice [of the witness] and the subtle persistence of the judicial examination yield the greatest [result]; for from his speech and from the firmness or hesitancy with which a person says something, or from that reputation which everyone has in his own *civitas*, there come to light revelations of the truth. 6. Also, in actions concerned with establishing free status, the truth should not be sought by torturing those whose status is at issue.

11 PAUL, *Duties of Proconsul, book 2:* Even if a slave has been returned to the seller, he is not to be tortured in a capital case affecting the buyer.

12 ULPIAN, *Edict, book 54:* If someone, to avoid interrogation under torture, alleges himself to be free, the deified Hadrian has written in a rescript that he is not to be tortured before an action to determine his status has been heard.

13 MODESTINUS, *Rules, book 5:* It is accepted that a slave who has been valued at a particular price is to be put to the torture [only] when there has been a stipulation.

14 MODESTINUS, *Rules, book 8:* A *statuliber* found out in a delict is, in token of his expected freedom, to be punished not as a slave because of his doubtful condition but as a freeman.

15 CALLISTRATUS, *Judicial Examinations, book 5:* Interrogation under torture ought not to be applied to a freeman whose evidence is not inconsistent. 1. Again, the

deified Pius wrote in a rescript to Maecilius that a person under fourteen should not be tortured in a capital case affecting another, especially when the accusation might be completed without outside evidence. It does not, however, follow from this that such [young persons] are to be believed even without torture; for, said [Pius], their age, which is regarded as safeguarding them for the time being against the harshness of torture, makes them also the more suspect of a readiness to tell lies. 2. A person who has given a slave as security to someone who claims ownership [in the slave] is to be regarded as in the position of master, and accordingly [such] slaves can not be tortured in a capital case affecting him, as the deified Pius wrote in a rescript in these words: "You must furnish your case with other proofs; for interrogation under torture must not be applied to slaves when the possessor of the inheritance, who has given security to the plaintiff, is regarded for the meantime as in the position of master."

16 MODESTINUS, *Punishments, book 3:* The deified brothers wrote in a rescript that interrogation under torture may be renewed. 1. A person who has made a confession on his own account shall not be tortured in a capital case affecting others, as the deified Pius wrote in a rescript.

17 PAPINIAN, *Replies, book 16:* It has been agreed that even when a person outside the family is bringing the accusation, slaves may be interrogated [to give evidence] against their master in a question of adultery. The deified Marcus and subsequently our own great emperor have followed this principle in their judgments. 1. However, in a case of *stuprum,* slaves are not tortured [to give evidence] against their master. 2. Where the question is one of substituted birth, or if [someone] is claiming an inheritance whom the other sons allege not to be their brother, interrogation under torture will be applied to the slaves of the inheritance, because the interrogation is not [to provide evidence] against their masters, the other brothers, but concerns the succession to their [former] master who is dead. This agrees with what the deified Hadrian wrote in a rescript; for when one partner was being prosecuted for murdering another, he wrote in a rescript that a slave who was their joint property should be examined under torture, since it seemed that this would be for the benefit of his [dead] master. 3. I gave the opinion that a slave condemned to the mines should not be tortured [to give evidence] against the person who was previously his owner; and that it does not affect the case even if he confesses that he assisted in the crime.

18 PAUL, *Views, book 5:* Where a number of persons are charged with the one crime, they are to be heard in such a way that a beginning is made with the one who is the more afraid or appears to be of tender years. 1. An accused who has been overwhelmed with clearer proofs can be recalled to interrogation under torture, especially if he steels his body and spirit against the pains. 2. In a case where the accused is not hard-pressed by any proofs, tortures should not readily be applied, but the accuser should be urged [himself] to make good and prove true his charges. 3. Witnesses are not to be tortured for the sake of demonstrating falsehood or discovering the truth unless they are alleged to have had a hand in the act. 4. A judge, when he cannot put reliance on the family, will be able to put to the torture slaves of the inheritance. 5. Credence is not given to a slave who confesses something relating to his master of his own accord; for it is not right in matters of doubt for the master's well-being to be entrusted to the whim of his slaves. 6. A slave cannot be interrogated [to give evidence] in a capital case against a master by whom he was sold off and whom he formerly served, in memory of the former ownership. 7. A slave, even if he is offered for torture by his master, is not to be interrogated [in a capital case affecting the master]. 8. Indeed, whenever the question arises of whether slaves are to be interrogated in capital cases affecting their master, [the nature of] his ownership over them must first be investigated. 9. A governor who is about to conduct a hearing into charges should, before the day [of the trial], make it public that he is going to hear the persons in custody, so that persons who need a defense may not be assailed by charges brought suddenly by their accusers; although an accused who requests a defense at

any time should not be denied it, so much so that for that reason persons in custody may [have their appearance] deferred and postponed. 10. Persons in custody can be heard and condemned not only before the tribunal but also outside the court.

19 TRYPHONINUS, *Disputations, book 4:* A person to whom freedom is due under a *fideicommissum* may not be subjected to interrogation as a slave unless and only unless he is accused as a result of the interrogations of others.

20 PAUL, *Decrees, book 3:* A certain husband as his wife's heir was claiming from Surus money which he said the dead woman had lodged with Surus, while he himself was absent, and he had produced a single witness to this, the son of his freedman, before the procurator; he had also sought the interrogation under torture of Surus's handmaid. Surus continued to deny that he had received [the money], and [said] that the testimony of a single person should not be admitted, and that it was not customary to begin with interrogations under torture, even if the handmaid had belonged to a third party. The procurator put the maid to the torture. When the case came to the cognizance of the emperor on appeal, he pronounced that the torture had been conducted unlawfully, that reliance should not be placed on the evidence of one witness, and that therefore the appeal had been rightly lodged.

21 PAUL, *Punishments of Civilians, sole book:* The deified Hadrian wrote in a rescript that no one should be condemned for the purpose of putting him to the torture.

22 PAUL, *Views, book 1:* Persons taken into custody without accusers are not to be subject to torture unless there are any suspicions strongly attaching to them.

19

PUNISHMENTS

1 ULPIAN, *Disputations, book 8:* Whenever an investigation is made into an offense, it is accepted that [the accused] should suffer, not the punishment which his status allows at the time when sentence is passed on him but that which he would have undergone if he had been sentenced at the time he committed the offense. 1. Similarly, if a slave has committed an offense and is said subsequently to have attained his freedom, he ought to undergo that punishment which he would have undergone if he had been sentenced when he committed the offense. 2. On the other hand, too, if someone has been reduced to a meaner status, he ought to suffer that punishment which he would have undergone had he remained in his former status. 3. It is generally agreed that, in terms of the statutes which deal with criminal proceedings or private charges, prefects or governors conducting proceedings *extra ordinem* should impose punishment *extra ordinem* on those who escape a monetary penalty by their lack of means.

2 ULPIAN, *Edict, book 48:* We should understand a person condemned on a capital charge [as condemned] on grounds for which the appropriate [punishment] for the condemned is death or loss of citizenship or slavery. 1. It is agreed that since the time that deportation replaced interdict from fire and water, a person does not lose his citizenship before the emperor has ordered him to be deported to an island; for there is no doubt that a governor does not have the power to deport. However, the urban prefect does have the right of deportation, and immediately after the prefect has passed sentence, [the condemned man] is seen to have lost his citizenship. 2. A person who has not lodged an appeal we shall take to be condemned; but if he should appeal he is regarded as not yet condemned. If, however, a person be condemned by someone who does not have the right to condemn on a capital charge, he is in the same position [as if not yet condemned]. For a man is only condemned where the condemnation was valid.

3 ULPIAN, *Sabinus, book 14:* The punishment of a pregnant woman who has been condemned to death is deferred until she gives birth. Indeed, I know that it is the practice that she is not to be interrogated under torture so long as she is pregnant.

4 MARCIAN, *Institutes, book 13:* Those who have been relegated or deported to an island must stay away from prohibited places. We also use this rule to mean that a relegated

person should depart from forbidden places but should not leave his island; otherwise, a person relegated for a period is punished with permanent exile, someone relegated permanently with relegation to an island, a person relegated to an island with deportation, and someone deported to an island with capital punishment. It is the same if a person does not depart into exile within the time within which he should have gone, or if in any other way he fails to comply with [the terms of] his exile; for his contumacy increases the penalty. Nor can anyone give an exile leave of absence or the parole to return, except the emperor, for special cause.

5 ULPIAN, *Duties of Proconsul, book 7:* The deified Trajan wrote in a rescript to Julius Fronto that in criminal cases a person should not be condemned in his absence. He also wrote in a rescript to Adsidius Severus that neither ought a person to be condemned on suspicion; for it was preferable that the crime of a guilty man should go unpunished than an innocent man be condemned. However, judgment ought to be pronounced against contumacious persons who fail to comply with the summonses or edicts of the governors, even in their absence, after the manner of private actions. It is possible to maintain that these principles are not contradictory; what, then, is the answer? It will be better to lay down that penalties involving money or affecting a person's reputation can be imposed on absent persons if, after frequent warnings, they fail [to appear] through contumacy, and this may go so far as relegation; but if there is any heavier penalty to be imposed, let us say condemnation to the mines or capital punishment, it must not be imposed on the absent. 1. For an absent accuser, however, it must be stated that more serious measures are sometimes provided than the penalty imposed by the *senatus consultum Turpillianum.* 2. The words of the rescript [are as follows]. Rightly, Taurinus, have you tempered the penalty on Marus Evaristos in accordance with the degree of his culpability; for it is relevant in more serious offenses whether any act was committed by design or by accident. Indeed, in all charges this distinction must either call forth the penalty of the law or allow mitigation.

6 ULPIAN, *Duties of Proconsul, book 9:* Should anyone, to avoid punishment, happen to say that he has something to tell the emperor concerning his safety, then one must consider whether he should be sent up to the emperor. The majority of governors are so timid that, even after sentence has been passed on the man, they suspend the punishment and do not dare to do anything; others have no patience at all with persons who make any such allegation; while some do not [make it a habit] either always or never to send them up, but inquire what they wish to bring to the notice of the emperor and what they may have to say concerning his well-being, after which they either suspend the punishment or do not. This appears to be the rational middle way. My own view, however, is that once persons have been condemned, they have absolutely no right to a hearing, whatever allegations they make. For who doubts that they have recourse to these [expedients] for the sake of escaping punishment, and that they deserve heavier punishment for having left unsaid so long that which they claim to have to say concerning the emperor's well-being? For they ought not to have been silent for so long over so important a matter. 1. If the proconsul finds that certain slaves of his staff or of his legate are guilty, should he impose punishment on them or reserve them for his successor? There are extant, however, many precedents [showing] that [governors] have punished not only the slaves of their officials and those who act under them, but even their own slaves; something which should indeed be done so that, deterred by this example, they may the less offend. 2. We must now set out the classes of punishment that the governors may inflict on someone. Now there are certain punishments that may take away life, or inflict slavery, or deprive of citizenship, or include either exile or corporal punishment,

7 CALLISTRATUS, *Judicial Examinations, book 6:* (such as *admonitio,* or beating with rods; *castigatio,* or a lashing; *verberatio,* or a flogging with chains)

8 ULPIAN, *Duties of Proconsul, book 9:* or a fine with infamy, or a degradation from a rank, or the forbidding of a particular action. 1. Life is taken away if, say, a person is condemned to be put to death with the sword. But it must be punishment by the sword; for governors do not have the right of killing by the ax, or the javelin, or the club, or the noose, or in any other manner, much less by poison, in the same way that they do not have the right to allow a free choice of death. However, the deified brothers wrote in a rescript allowing a free choice of death. 2. Enemies [of the state] and also deserters to the enemy are punished by being burned alive. 3. Nor should anyone be condemned to death by flogging, or scourging, or by torture, although very many happen to die while being tortured. 4. There is punishment which takes away freedom; of this kind is, say, condemnation to the mines or the *opus metalli.* Mines are numerous, some provinces possessing them and others not; those that have not send [their condemned criminals] to those that have. 5. In a letter of the deified Severus to Fabius Cilo, it is clearly stated that the urban prefect has a special competence to condemn persons to the mines. 6. The only difference between those condemned to the mines and those to the *opus metalli* lies in their chains, that those condemned to the mines are weighed down with heavier chains and those to the *opus metalli* with lighter, and that any who abscond from the *opus metalli* are handed over to the mines, [while those who abscond] from the mines are more severely punished. 7. It is customary for anyone condemned to forced labor who absconds to be condemned to a double term; but the term doubled should be that which he would have had left to serve when he ran away, and, indeed, the term is not doubled from the time when he was arrested and imprisoned. And if he was condemned to ten years, his sentence should either be extended to life, or he should be transferred to the *opus metalli.* Clearly, if he was sentenced to a ten-year term and immediately ran away at the outset, one must consider whether the period is to be doubled, or extended to life, or whether he is to be transferred to the *opus metalli;* and the prevailing view is that he should be transferred, or sentenced to life. For it is generally said that, where a doubling [of the sentence] would take the period beyond ten years, the penalty should not be limited in time. 8. Women are customarily condemned to the service of convicts in the mines, either permanently or for a period; in a similar manner [they may be condemned] to the saltworks. If, indeed, they are sentenced in perpetuity, they are made, as it were, *servae poenae;* but if they are sentenced for a fixed period, they retain their citizenship. 9. Governors are in the habit of condemning men to be kept in prison or that they might be kept in chains, but they ought not do this; for punishments of this type are forbidden. Prison ought to be employed for confining men, not punishing them. 10. Persons are also customarily condemned to the lime quarries or to the sulphur mines; these punishments, however, are heavier than [condemnation] to the [ordinary] mines. 11. We must see whether all those who have been condemned to the hunting games are made *servi poenae;* of course, it is customary for the younger men to suffer this punishment. Therefore, we must see whether these are made *servi poenae* or whether they retain their freedom. The prevailing view is that they too are made *servi* [*poenae*]; for they only differ from the others in this, that they are set to be huntsmen or Pyrrhic dancers or [to provide] some other kind of pleasure by pantomime or other movements of their bodies. 12. There is no doubting that slaves are customarily condemned to the mines, or to the *opus metalli,* or again to the hunting games; and if they are handed over [for these] they are made *servi poenae* and will no longer belong to him whose property they were before their condemnation. In point of fact, when a certain slave, after being condemned to the mines, had been delivered from that punishment by the favor of the emperor, the Emperor Antoninus very correctly stated in a rescript that because the slave had ceased to be his master's property once he was made a *servus poenae,* he should not thereafter be returned to [that]

master's power. 13. If, however, a slave is condemned to fetters, whether permanently or temporarily, he remains the property of him who was his master before he was condemned.

9 ULPIAN, *Duties of Proconsul, book 10:* It is the practice for governors also to forbid [people] to act as advocates. Sometimes they forbid them permanently, sometimes for a fixed period, measuring that period either by years or by the term for which they govern the province. 1. A person can also be forbidden in such terms as to prevent his representing specified persons. 2. He can again be forbidden to plead before the governor's court, but not prohibited from conducting cases before the legate or the procurator. 3. If, however, he is forbidden to plead before the legate, I think that in consequence he will also have lost the right to plead before the governor. 4. Sometimes a person will be forbidden, not [just] the right to act as advocate, but the [entire] practice of law. It is a more serious business to forbid the practice of law than [to forbid] acting as an advocate, if, indeed, a person is absolutely prohibited from engaging in legal business. It is customary [as a penalty], however, to prohibit in this way law students, advocates, and those who draw up documents, or draftsmen. 5. They are customarily forbidden to frame any kind of legal documents, to draw up petitions, or to seal depositions. 6. It is also customary [to forbid them] to sit in any place where legal documents are publicly deposited, for example, a public record office or registry. 7. Again, it is customary [to forbid them] to draw up, write, or sign wills. 8. There will also be this penalty, that a person may not take part in public business; for in this case, he is able to take part in private business but prohibited from public, as are customarily those on whom sentence is passed *δημοσίων ἀπέχεσθατ* (to abstain from public affairs). 9. There are also other punishments: Someone may be ordered to abstain from commerce, or to take on one of those contracts which are let publicly, such as the *vectigalia publica.* 10. It is common to forbid persons [to engage in] a commercial transaction or transactions; but let us see whether one can condemn someone to take on a transaction. Punishments of this kind, if one wishes to treat the subject in general terms, are indeed contrary to the *jus civile* in ordering an unwilling man to do something which he cannot do; but to deal with the subject specifically, there can be just reason for compelling someone to [take on] a transaction; and if this be the case, the sentence must be followed. 11. These are in general the punishments which are customarily imposed. You must know, however, that there are distinctions between punishments, and not all persons can have the same one imposed on them. To begin with, decurions cannot be condemned to the mines or to the *opus metalli* nor subjected to the gallows nor burned alive. If, by chance, they are so sentenced, they must be freed. This, however, cannot be done by the person who pronounced sentence, but the matter must be referred to the emperor so that the penalty may be altered or remitted by his authority. 12. The parents and children of decurions are also in the same position. 13. We should take "children" to mean all their children, not only their sons. 14. We must, though, see whether only those children whom they have had after [their admission to] the decurionate are exempt from these punishments, or all their children, even those whom they had when their family was of inferior rank. I think the better view is that they all have this privilege. 15. Clearly, if the father ceases to be a decurion, any child born while he was still a decurion will have the privilege of not being [so] punished; however, should a man have a son after he has become of lower rank, that son will be liable to punishment as the son of one of lower rank. 16. The deified Pius wrote to Salvius Marcianus in a rescript that a *statuliber* should be punished as a freeman.

10 MACER, *Criminal Proceedings, book 2:* In the case of slaves, the rule is observed that they are punished after the fashion of men of low rank. For the same reasons that a freeman is beaten with rods, a slave is ordered to be beaten with lashes and returned

to his master; and for those [reasons] that a freeman, after being beaten with rods, is handed over to forced labor, a slave, under the punishment of fetters for the whole of that time, is ordered to be lashed and returned to his master. If he is ordered, being under the penalty of fetters, to be returned to his master but is not taken back by him, he is ordered to be sold and, if he does not find a buyer, to be handed over to forced labor in perpetuity. 1. If any who have been sent to the mines for some reason have committed an offense thereafter, it is right to deal with them simply as men condemned to the mines although they have not yet been dispatched to the place where they have to labor; for they change their status as soon as sentence is passed on them. 2. In the case of all persons, men of inferior rank as much as decurions, it is laid down that he who is inflicted with a heavier punishment than the statutes lay down does not become infamous. Therefore, if someone has been punished with a temporary spell of forced labor, or simply beaten with rods, then even if the action involves infamy, such as an action for theft, he must be said not to be infamous, because one single stroke of the rods is more serious than condemnation to a fine.

11 MARCIAN, *Criminal Proceedings, book 2:* It is for the judge to see that a sentence more severe or lighter than the case demands is not passed; for he should not strive for a reputation either for severity or for clemency, but should sentence with considered judgment, as each case demands. Clearly, in cases of less seriousness, judges should be more prone to leniency, while with more serious penalties they should conform to the severity of the statutes, tempered by kindliness. 1. Domestic thefts, if of a more trifling kind, should not be the subject of public actions, nor should an accusation of this kind be permitted, where a slave is handed over for interrogation under torture by his master, or a freedman by the patron in whose house he lives, or a hired worker by the man to whom he has hired his services; for the term "domestic thefts" is used for pilfering by slaves from their masters, or freedmen from their patrons, or hired workers from those in whose houses they live. 2. An offense is committed by design, by impulse, or by accident. Robbers who form a gang offend by design; those who drunkenly resort to fists or swords, by impulse; while a javelin launched at a wild beast in the course of a hunt which kills a man does so by accident. 3. Capital punishment is to be thrown to the beasts or to suffer other punishments of the same kind, or to be executed [by the sword].

12 MACER, *Duties of Governor, book 2:* So far as the status of the condemned is concerned, it makes no difference whether their trial is public or not; for regard is paid solely to the sentence, not to the nature of the charge. Therefore, those ordered to execution or who are given to the beasts forthwith become *servi poenae.*

13 ULPIAN, *Appeals, book 1:* Nowadays [a judge] who is hearing a criminal case *extra ordinem* may lawfully pass what sentence he wishes, whether heavier or lighter, provided only that he does not exceed what is reasonable in either direction.

14 MACER, *Military Law, book 2:* Certain offenses, which bring no penalty, or a relatively light one, on a civilian, [are visited] more heavily on a soldier. For Menander writes that if a soldier takes part in stage plays or permits himself to be sold into slavery, he should suffer capital punishment.

15 VENULEIUS SATURNINUS, *Duties of Proconsul, book 1:* The deified Hadrian forbade the capital punishment of any who were classed as decurions, save for those who had killed their parents; and indeed it is very fully provided in [imperial] mandates that they are to be punished with the penalty of the *lex Cornelia.*

16 CLAUDIUS SATURNINUS, *Penalties of Civilians, sole book:* There are punishments for things done, such as thefts and killings, or for things said, such as insults or false pleadings, or for things written, such as forgeries and libels, or for things counseled, such as conspiracies and the guilty knowledge of robbers; and the scale of the crime is the same for those who aid others by advice. 1. These four categories, however, must be considered in seven aspects: the motive, the person, the place, the time, the quality, the quantity, and the outcome. 2. The motive: for example, flogging, which goes unpunished if administered by a magistrate or parent, because it is inflicted for the purpose of correction not for the sake of insult; but it is punished when someone has been beaten up in anger by an outsider. 3. The person is looked at in two ways: the person who did the act and the person who suffered [it]; for slaves and freemen are punished differently for the same crimes, and differently, too, someone who dares [to wrong] a master or parent as opposed to an outsider, or who [offends]

a magistrate as opposed to a private person. In considering this matter, regard must also be had to age. 4. Place affects whether the same offense is theft or sacrilege and whether it calls for capital punishment or some lesser penalty. 5. Time distinguishes someone who absents himself without leave from a deserter, and a housebreaker or daytime thief from a thief by night. 6. Quality is when the act is either more or less grave, as manifest thefts are customarily distinguished from nonmanifest thefts, brawls from highway robbery, plundering from theft, impudence from violence. On this subject, Demosthenes, the greatest of the Greek orators, says as follows [in Greek]: "It was not then the blow which caused anger, but the dishonor; for what is terrible to freemen is not being beaten, although this is terrible, but the insult [of being beaten]. Gentlemen of Athens, the man who strikes the blow might do many things which the victim could not even report to a third party: by his manner, by his look, by his voice, as conveying an insult, as being an enemy, [hitting him] with his fist or open-handed. It is these things that move, that drive out of their minds, men who are themselves unused to contumely." 7. Quantity distinguishes a thief from a rustler; for the man who steals a single pig will be punished as a thief, he who steals a herd as a rustler. 8. The outcome is to be considered, even if [the act] was done by a most inoffensive man, although the law punishes the man who is in possession of a weapon for the purpose of homicide no less than him who kills. Therefore, also among the Greeks accidental happenings were expiated by voluntary exile, as is written by the archpoet [Homer]:

> Me, when a child, Menoitius from Opys
> led to your house, for miserable murder
> on the day when I, foolish, inadvertent,
> killed Amphidamas' son, angry over dicing.

9. It happens that the same crimes are punished more severely in certain provinces, for example, harvest-burners in Africa, those [who set light to] vines in Mysia, and those who debase the coinage where there are mines. 10. It sometimes happens that the penalties for some crimes are made tougher, [for example] whenever the excessive numbers of persons engaged in highway robbery need a lesson.

17 MARCIAN, *Institutes, book 1:* Some [convicts] are *servi poenae* such as those sent to the mines or to the *opus metalli*; and if anything is left to them in a will, it is treated as though it had not been written, as if it had been left not to Caesar's slave but to a *servus poenae*. 1. Again, some people are "stateless," that is, without a *civitas*, like those handed over for forced labor in perpetuity and those deported to an island, so that they have no rights under the *jus civile* but retain those which are of the *jus gentium*.

18 ULPIAN, *Edict, book 3:* No one is punished for thinking.

19 ULPIAN, *Edict, book 57:* Should slaves not be defended by their masters, they are not taken away for punishment on the spot, but will be allowed to be defended even by a third party, and [the judge] conducting the trial must inquire into their innocence.

20 PAUL, *Plautius, book 18:* If a penalty is imposed on anyone, it is accepted by a legal fiction that it is not to pass on to his heirs. The reason for this appears to be that punishment is laid down to correct men; and it ceases with the death of him on whom it is imposed.

21 CELSUS, *Digest, book 37:* Death is the only meaning we have for the extreme penalty.

22 MODESTINUS, *Distinctions, book 1:* Persons condemned to the mines, if they are found to be unfit for doing the work because of sickness or the infirmity of age, under a rescript of the deified Pius, can be released by the governor, who will consider their release provided only that they have relatives, by blood or marriage, and have served not less than ten years of their sentence.

23 MODESTINUS, *Rules, book 8:* If, through the inexperience of the person awarding [sentence], someone is sent to the mines without a predetermined time limit, is seems that his sentence is limited to ten years.

24 MODESTINUS, *Encyclopaedia, book 11:* We must know that persons who have been relegated or deported on the ground of treason are to have their statues pulled down.

25 MODESTINUS, *Encyclopaedia, book 12:* If anyone has been under accusation for a long time, his punishment is to be lightened to some extent; and it is so laid down, that those who have long lain under accusation are not to be punished in the same manner as those who receive their sentence promptly. 1. No one can be condemned to be thrown from the [Tarpeian] rock.

26 CALLISTRATUS, *Judicial Examinations, book 1:* The crime or punishment of the father cannot inflict any stain on the son; for each individual suffers his fate for his own crime, nor is he made the successor to the offense of another; as the deified brothers wrote in a rescript to the citizens of Hierapolis.

27 CALLISTRATUS, *Judicial Examinations, book 5:* The deified brothers wrote in a rescript to Arruntius Silo that it was not customary for provincial governors themselves to rescind the sentences pronounced by them. They also sent a rescript to Vetina Italicensis that no one could vary the sentence given by himself, and that this had become unusual. If, however, a person misrepresents himself or, lacking the documentary proof which he discovers later, has been sentenced to punishment, there are extant a number of imperial rescripts in which either the punishment of such persons is reduced or their original status is restored. This, however, can be done only by the emperors. 1. As to decurions and leading citizens of *civitates* who commit capital offenses, it is provided in mandates that if one of them should appear to have committed an offense for which he should be relegated to an island outside his own province, a letter must be sent to the emperor with a note of the sentence passed by the governor. 2. In another chapter of the mandates it is provided in the following words: "If any of the leading citizens of any *civitas* commit brigandage or any other crime such that they appear to have deserved the death penalty, you are to keep them in fetters and to write to me, adding what each of them has committed."

28 CALLISTRATUS, *Judicial Examinations, book 6:* The stages of capital punishments are more or less as follows. The extreme penalty is held to be condemnation to the cross. There is also burning alive; this, however, though deservedly included in the term "extreme penalty," is yet regarded as following after the first, because this class of punishment was devised at a later time. Also there is beheading. Then, the next punishment after death is sentencing to the mines; after that, deportation to an island. 1. The remaining punishments relate to a person's reputation, not to the risk of his *caput*, such as relegation, for a period or permanently, or to an island, or when someone is handed over to forced labor, or punished by beating with rods. 2. It is not the custom for all persons to be beaten with rods, but only freemen of the poorer classes; men of higher status are not subject to beating with rods, as is specifically laid down in imperial rescripts. 3. Certain persons, who commonly call themselves "the lads," in certain towns where there is unrest play to the gallery for the applause of the mob. If they do no more than this and have not previously been admonished by the governor, they are beaten with rods and dismissed, or also forbidden to attend public entertainments. But if after such correction they are caught doing the same again, they should be punished with exile; or sometimes capital punishment may be imposed, for example, when they have too often been guilty of seditious and riotous behavior and after repeated arrests and over-lenient treatment persist in the same rash attitude. 4. It is the custom for slaves, after they have been beaten, to be returned to their masters. 5. If I may speak in general terms, all those who are forbidden to be beaten with rods must have the same respect for their rank [shown to them] as decurions have; for it is inconsistent to say that anyone whom the imperial constitutions forbid to be beaten with

rods may be sent to the mines. 6. The deified Hadrian wrote a rescript in these words: "No one should be condemned to the *opus metalli* for a fixed time, but anyone who is condemned for a period, even if he does the task of a mineworker, should not be regarded as condemned to the mines; for he retains the freedom which those condemned to forced labor in perpetuity lose." Similarly, women condemned in this manner give birth to free children. 7. It is forbidden to flee for refuge to the statues or pictures of the emperors to the injury of another. For since the laws confer freedom from fear equally on all men, taking refuge at the emperors' statues or pictures is rightly seen as intended to injure another rather than to protect oneself, unless someone held in chains or under guard by the *potentiores* flees to protection of this kind; for these [persons] are to be given pardon. The senate has resolved that no one is to flee for refuge to statues or pictures; and the deified Pius wrote in a rescript that a man who had exhibited Caesar's picture to arouse the enmity of another was to be confined in the public prison. 8. All crimes against a patron, or the son, father, near relative, husband, wife, or other connections of a patron, are to be punished more severely than those against outsiders. 9. Poisoners are to suffer capital punishment or, if regard must be had to their rank, deported. 10. Footpads who do it for the sake of loot are regarded as very close to brigands; and if they set out to attack and rob with swords, they suffer capital punishment, especially if they have committed the act repeatedly and on footpaths; others are condemned to the mines or relegated to islands. 11. Slaves who have conspired against the wellbeing of their masters are generally burned in the fire, as sometimes also are free plebeians and persons of low rank. 12. Arsonists who start fires within a built-up area for enmity or for gain are subject to capital punishment; generally, they are burned alive. But those who [burn] a cottage or farm [are punished] somewhat more lightly. Accidental fires, if, when they could have been avoided, they have caused damage to the neighbors through the negligence of those on whose property they started, are the subject of civil actions (in such a way that the person who suffered the loss decides on the damages) or punished only moderately. 13. Degrees of punishment for exiles were laid down by an edict of the deified Hadrian; so he who has been relegated for a period, if he returns [prematurely], is relegated permanently; he who has been relegated permanently, if he returns, is relegated to an island; one relegated to an island, if he escapes, is deported to an island; while he who gets away after deportation suffers capital punishment. 14. So also, as the same emperor wrote in a rescript, must a scale be observed for persons in custody, so that persons who had been condemned [to forced labor] for a period and had escaped were condemned permanently; those condemned permanently were condemned to the mines; those who, after condemnation to the mines, committed [an escape], suffered the extreme penalty. 15. The practice approved by most authorities has been to hang notorious brigands on a gallows in the place which they used to haunt, so that by the spectacle others may be deterred from the same crimes, and so that it may, when the penalty has been carried out, bring comfort to the relatives and kin of those killed in that place where the brigands committed their murders; but some have condemned these [criminals] to the beasts. 16. Our ancestors, whatever the punishment, penalized slaves more severely than freemen, and notorious persons more than those of unblemished reputation.

29 GAIUS, *Lex Julia et Papia, book 1:* Those condemned to the extreme penalty immediately lose their citizenship and their freedom. This fate therefore anticipates their death, sometimes by a long period, as happens in the persons of those who are condemned to the beasts. Again, it is often the custom for them to be kept [alive] after their condemnation, so that they may be interrogated under torture against others.

30 MODESTINUS, *Punishments, book 1:* If anyone does anything whereby men's light minds are frightened by superstitious awe, the deified Marcus wrote in a rescript that persons of this kind are to be relegated to an island.

31 MODESTINUS, *Punishments, book 3:* The governor should not, at the whim of the people, discharge persons who have been condemned to the beasts; but if they are of such strength or cunning that they can worthily be exhibited to the populace of Rome, he should seek the advice of the emperor. 1. The deified Severus and Antoninus wrote in a rescript that condemned persons should not be transferred from one province to another without the emperor's permission.

32 ULPIAN, *Edict, book 6:* If a governor or judge gives an interlocutory judgment: "You have committed *vis,*" arising out of an interdict, the accused will not be branded [with infamy], nor will the penalty of the *lex Julia* follow; if, however, he does so arising out of a [criminal] charge, it is another matter. What if the governor fails to distinguish between the *lex Julia* on *vis publica* and the *lex Julia* on *vis privata*? That will have to be considered then in the light of the charge. However, if charges have been brought under both statutes, the milder, that is, the statute on *vis privata,* shall be followed.

33 PAPINIAN, *Questions, book 2:* The imperial brothers wrote in a rescript that slaves condemned to temporary imprisonment may, when they have served their time, obtain their freedom and an inheritance or legacy; for punishment imposed for a period by a [court] sentence purges the penalty. If, however, the gift of liberty were to find them while they are actually in prison, the principle of the law and the words of the constitution thwart their freedom. Clearly, if a slave is granted liberty in a will and at the moment at which he enters upon the inheritance his time of imprisonment has elapsed, he will rightly be regarded as manumitted, just as if a debtor should have manumitted a slave given as a pledge and his inheritance had been entered upon after the redemption of the pledge.

34 PAPINIAN, *Replies, book 16:* A slave is not handed over to forced labor in perpetuity, much less for a set period. Accordingly, when through a mistake a slave had been handed over to [forced] labor for a period, I gave the opinion that at the expiry of that period he should be returned to his master. 1. I also gave the opinion that in terms of the spirit of the *senatus consultum,* those who instigate an accuser through the agency of a man of straw are liable to the accuser's penalty.

35 CALLISTRATUS, *Questions, book 1:* In the mandates given by the emperors to provincial governors, it is provided that no one is to be condemned to permanent imprisonment; and the deified Hadrian also wrote a rescript to this effect.

36 HERMOGENIAN, *Epitome of Law, book 1:* Those condemned to the mines, as also to the service of the mineworkers, are made slaves, that is, *servi poenae.*

37 PAUL, *Views, book 1:* It is agreed that commodity hoarders may be punished *extra ordinem* according to the degree of their crime because of the false size of their measures; this is for the benefit of the people's corn dole.

38 PAUL, *Views, book 5:* If anyone has stolen anything from an imperial mine or from an imperial mint, he is punished by the penalty of [being sent to] the mines and exile. 1. Deserters to the enemy or those who betray our counsels are either burned alive or hanged on the gallows. 2. Those who are responsible for sedition and disturbance when a mob has been excited are, according to their social standing, either hanged on the gallows or thrown to the beasts or deported to an island. 3. Those who seduce underage virgins, if they are of lower rank are condemned to the mines, if of higher status, relegated to an island or sent into exile. 4. [A slave] who fails to prove that he has bought his freedom with his own money cannot claim his freedom; further, he is returned to the same master under penalty of fetters or, if the master himself prefers, condemned to the mines. 5. Those who administer an abortifacient or aphrodisiac draught, even if they do not do so with guilty intention, are still condemned, because the deed sets a bad example, if of lower rank to the mines, if of higher status to relegation to an island with the forfeiture of part of their property. But if for that reason a man or woman dies, they suffer the extreme penalty. 6. A will which is not according to law is suppressed without penalty; for there is nothing which may be

claimed under or based upon it. 7. Anyone who opens, recounts, or unseals the will of a person in his lifetime is liable to the penalty of the *lex Cornelia*; and generally those of lower rank are condemned to the mines; those of higher status, deported to an island. 8. If anyone proves that a document [relevant to] his lawsuit has been revealed by his procurator to his opponent, the procurator, if he is of lower rank, is condemned to the mines, if of higher status, forfeits half his property and is relegated permanently. 9. If anyone with whom documents have been deposited returns them to someone else in [the depositor's] absence or betrays them to his opponent, he is condemned to the mines or deported to an island according to his personal standing. 10. If judges delegate are alleged to have been corrupted with money, they are generally either removed from [their] court or sent into exile or relegated for a fixed period by the governor. 11. A soldier who has broken out of prison after being given a sword suffers capital punishment. Someone who has deserted along with the man whom he was guarding is liable to the same penalty. 12. A soldier who has attempted suicide but has not carried it through must suffer capital punishment, unless he did so because of unbearable pain or sickness or some sort of grief or for some other cause in which case he is to get a dishonorable discharge.

39 TRYPHONINUS, *Disputations, book 10:* Cicero, in his speech *pro Cluentio Habito*, wrote that when he was in Asia a certain woman of Miletus had been condemned for a capital offense because, after taking money from the substituted heirs, she herself aborted her own child with drugs. But if [a woman], because she is pregnant, does violence in some way to her womb after her divorce so as to avoid giving a son to her husband who is now hateful, she is to be punished by temporary exile, as has been written in a rescript by our most noble emperors.

40 PAUL, *Decrees, book 3:* It was decided to deport Metrodorus to an island, since he knowingly harbored a fleeing enemy, and to relegate Philoctetes to an island because, though he knew the man was being concealed, he kept the matter quiet for a long time.

41 PAPINIAN, *Definitions, book 2:* The sanction of the statutes, which in most recent times imposes a fixed penalty on those who fail to comply with the provisions of a statute, is not seen as applying to those special cases to which a penalty is specifically attached by the statute itself. There is no doubt that in all other [aspects] of the law the particular derogates from the general, nor indeed is it likely that a single offense should be punished on different assessments under the same statute.

42 HERMOGENIAN, *Epitome of Law, book 1:* In the interpretation of the statutes punishments should be mitigated rather than made harsher.

43 PAUL, *Replies, book 1:* The Emperor Antoninus wrote in a rescript to Aurelius Atilianus: "A governor cannot forbid anyone to practice his profession beyond the term of his own administration." 1. The same [emperor] gave the opinion that a person who by his own crime has lost the status of a decurion cannot claim the status of a decurion's son to avoid punishment.

20

PROPERTY OF CONDEMNED PERSONS

1 CALLISTRATUS, *Law of the Imperial Treasury and the People, book 1:* On [a man's] condemnation to lose life or citizenship or to be reduced to slavery, [his] property is confiscated. 1. Although [children] conceived before but born after condemnation take their portions from the property of their condemned fathers. 2. However, children

are granted their portion only if they are born of a *jus civile* marriage. 3. The children of a person who has forfeited only one half of his property are not given their shares [in the other half], as was written in a rescript by the deified brothers.

2 CALLISTRATUS, *Judicial Examinations, book 6:* Someone should not be stripped when he is put in prison but [only] after his condemnation, as the deified Hadrian wrote in a rescript.

3 ULPIAN, *Edict, book 33:* A woman's dowry is confiscated if she is condemned under [one of] five statutes: treason, *vis publica*, parricide, poisoning, and murder.

4 PAPINIAN, *Adulterers, book 2:* And the husband has all his rights of action intact against the imperial treasury absolutely.

5 ULPIAN, *Edict, book 33:* If, however, she receives capital punishment under another statute under which her dowry is not confiscated because she is first made a *serva poenae*, it is true that her dowry falls to her husband's gain as if she had died. 1. But if a daughter-in-power is deported, Marcellus says, and his opinion is correct, that the marriage is not in any case dissolved by the deportation; for since the woman remains free, there is nothing to prevent the man from keeping his husbandly affection and the woman her wifely spirit. But if the woman is of a mind to leave her husband, then, says Marcellus, her father will bring an action for the [return of her] dowry. If, however, she is a *materfamilias* and is deported during the existence of the marriage, her dowry remains in the keeping of her husband; but if the marriage is afterward dissolved she can from considerations of humanity bring an action [for its return], as if the action had arisen today.

6 ULPIAN, *Duties of Proconsul, book 10:* The deified Hadrian wrote in a rescript to Aquilius Bradua as follows: "The explanation of [the term] 'old clothes' so far as it need be understood, is apparent from the name itself. For it would not be a correct use of words to say that the property of condemned persons means their old clothes, nor if someone has a belt around himself, ought anyone [else] to claim it straightway for himself; but [the term covers] the clothes the [condemned] is wearing or the small change in his moneybelt that he has for his subsistence, or rings of small worth, that is stuff which does not exceed [the value of] five aurei. Otherwise, if a condemned man has on his finger a sardonyx or some other costly jewel or if he has in his pocket a bond for a large sum of money, he will have no right to keep it under the heading of 'old clothes'." Old clothes are those things which a man taken into custody has brought along with him; the garments in which a man is dressed when he is led off for punishment, as the name itself shows. So neither may torturers claim these things of their own accord for themselves, nor their assistants ask for them, from those being stripped at the moment of execution; and governors ought not to turn this sum to their own profit, nor allow their junior staff or accounts clerks to misuse [such] money, but they must retain it for those purposes for which governors may lawfully incur expenditure, say, to provide certain officials with money for stationery, or to reward soldiers if they have performed bravely, as also to make a present to barbarians visiting them on an embassy, or for some other purpose. Frequently, also governors pass on money scraped together from this source to the imperial treasury; but this is really excessive zeal, since it is enough if [the governor] refrains from converting it to his own uses and allows it to be employed for the benefit of his office.

7 PAUL, *The Portions Which Are Permitted to Children of Condemned Persons, sole book:* Since natural reason, like a sort of unspoken law, would award children an inheritance from their parents, as if by summoning them to their due succession (for which reason also in the *jus civile* the name *sui heredes* is attached to them, and they cannot be removed from the succession even by the wish of the parent except for good reasons); the most equitable view is that in that event also, when the condemnation of a parent takes away his property by way of punishment, regard is had for the children, so that those untouched by blame may not pay too heavy a penalty for another's crime, sometimes being reduced to the direst poverty. It has been agreed that limits be set on a reduced scale so that those who were due to come into the whole [inheritance] under the law of succession should have shares allowed them from it. 1. If a freedman is executed, his patron should not be deprived of that part of his [freedman's] property which he would have received had the person executed died a natural death; the remainder of the property, which does not belong to the manumitter, shall be claimed by the imperial treasury. 2. It is equitable to grant shares in the property of the condemned to adoptive children no less than natural ones, unless the adoption was made for fraudulent purposes. An adoption is regarded as having been made for fraudulent purposes if someone, even if not [yet] under accusation but in desperation because of his knowledge of the situation, adopts another in fear of an impending accusation so that the [adopted person's] share may be deducted from the property which he expects to lose. 3. Should the condemned man have more than one son, examples are cited of all the property of the condemned being granted to the several children. And the deified Hadrian wrote in a rescript to this effect: "The number of children of Albinus's sons has made a favorable impression on me, since I prefer the empire to be increased by the addition of men rather than by abundance of money; and, therefore, I wish them to be granted their paternal property, which will very little enrich so many possessors, even if they take the whole." 4. Furthermore, the shares of the children are not augmented by what their condemned [father] obtained through his crime, for example, if he had contrived the death of a relative and entered on his inheritance or taken *bonorum possessio*; for so the deified Pius wrote in a rescript. Consequently, the same emperor laid down that when a daughter-in-power was convicted for poisoning him who had instituted her his heir, although it was at the command of her father in whose power she was that she had entered on the inheritance, it should still be claimed for the imperial treasury. 5. Property acquired after his condemnation by someone whose property is forfeit belongs, if he is relegated, to his heirs written or intestate; for a person relegated to an island has the capacity to make a will, as also his other rights [as a citizen]. But if he is deported, then, because of his loss of citizenship, he cannot have an heir, and the imperial treasury takes even those things that he acquired subsequently.

8 MACER, *Criminal Proceedings, book . . . :* The right of patronage is preserved intact for the children of patrons in respect of the confiscated property of a freedman of

their father. If there is a surviving son of the patron of that freedman, the imperial treasury has no claim on the share of the patron's son. 1. If the patron's son is excluded by the freedman's own children, it is better to say that the imperial treasury has no claim, because the freedman's children exclude the patron's son, while he in turn bars the imperial treasury. 2. There is no doubt that the patron's son, even if he does not seek *bonorum possessio,* excludes the imperial treasury from that share of the property of his father's freedman that is due to him. 3. The property of someone who is relegated can be confiscated by a specific sentence, but, however, his rights as against his freedmen are not taken from him except by order of the emperor. 4. If a father is condemned after giving a dowry for his daughter, the imperial treasury has no right to that dowry, even if the daughter later dies during her marriage,

9 CALLISTRATUS, *Fiscal Law, book . . . :* unless it is proved that the father had provided for his children out of fear of condemnation.

10 MACER, *Criminal Proceedings, book . . . :* Even if a father is condemned after promising a dowry for his daughter, her husband may claim it from the imperial treasury out of [the father's] property. 1. If the father is condemned after the dissolution of his daughter's marriage, then, if after [this] she gave him her consent to seek the return of the dowry, it is the imperial treasury that seeks it from the husband; if, however, she gave her consent before he was condemned, she herself has the claim for its return.

11 MARCIAN, *Criminal Proceedings, book . . . :* If a condemned person appeals and, while his appeal is pending, dies, his property is not confiscated; for in this case even a later will of his is valid. The position is the same even if his appeal has not been received. 1. A person charged with a crime other than treason can administer his property, lend money, and receive what is owed to him, if his debtors pay him in good faith; however, anything which he has fraudulently alienated is reclaimed after his condemnation.

21

PROPERTY OF PERSONS WHO BEFORE SENTENCE HAVE EITHER COMMITTED SUICIDE OR CORRUPTED THEIR ACCUSER

1 ULPIAN, *Disputations, book 8:* In capital charges, it has been decreed by the emperors that to have corrupted his opponent does not injure the person charged, but

[this applies] only in those [charges] which carry the death penalty; for they have ruled that a man should be pardoned for wanting to save his neck by any means whatsoever.

2 Macer, *Criminal Proceedings, book 2:* "The Emperors Severus and Antoninus to Julius Julianus. It is reasonable that those who, after being informed on by brigands, corrupt their accusers and then die, because they stand confessed of the charge, should leave no defense to their heirs." 1. If a person, concerning whose penalty a letter has been sent to the emperor (for example, because he is a decurion or because he deserves to be deported to an island), dies before a rescript be sent, should he be regarded as having died before sentence? By way of proof, there is a *senatus consultum* passed concerning those persons who, having been sent to Rome, have died before their sentence. Its words are as follows: "Since no one until this year can be regarded as condemned before judgment has been rendered and pronounced on him at Rome, his heirs ought to have possession of the property."

3 Marcian, *Accusers, sole book:* Accused persons who have been arraigned or who have been caught red-handed, and have committed suicide from fear of the impending charge, leave no heir. Papinian, however, in the sixteenth book of his *Replies*, has written to the effect that the property of those who lay hands on themselves when they have not been arraigned as defendants on a criminal charge is not forfeited to the imperial treasury; for it is agreed that it is not the wickedness of the deed that is subject to punishment, but that the fear resulting from guilty knowledge is taken in an accused [who commits suicide] to be as if he had confessed. Accordingly, they must either have been arraigned or caught in the act for their property to be confiscated if they kill themselves. 1. As the deified Pius wrote in a rescript, however, the property of a person who has committed suicide while under accusation should be claimed by the imperial treasury only where the charge of which he was accused was such that on condemnation he would have suffered death or deportation. 2. The same emperor wrote in a rescript that a man accused of a moderate theft, even should he have ended his life by hanging himself, did not seem to be in such a case that his property should be taken away from his heirs; for, indeed, the heirs would not have been deprived [of his property] if the theft had been proved against him. 3. Therefore, it must be said that the property of someone who has laid hands on himself is claimed by the imperial treasury if and only if he was implicated in a charge such that if he were convicted he would lose his property. 4. However, the deified Antoninus wrote in a rescript that if someone puts an end to his life through *taedium vitae* or unendurable pain of some kind, or otherwise, he has a successor. 5. The deified Hadrian wrote in a rescript that it appeared that a father, who had laid hands on himself because he was said to have killed his son, had primarily killed himself for grief at losing his son, and that, therefore, his property should not be confiscated. 6. But this distinction is made, that a person's motive for committing suicide is relevant, as when the question is raised of whether a soldier who has attempted suicide but has not carried it through should be punished, as if he carried out sentence on himself. For he should by all means be punished unless he was compelled to do so by *taedium vitae* or unendurable pain of some kind. And it is right that he should be punished if he has laid hands on himself without good cause; for he who has not been merciful to himself will much less be merciful to another. 7. It is laid down in mandates that the property of those persons who die in prison or on bail when the outcome of the case is in doubt is not to be confiscated. 8. If the heirs of a person who has died under accusation, at his own hand and without sufficient prior cause, are prepared to take up the case and demonstrate the innocence of the deceased, should they be given a hearing and the property not seized for the imperial treasury until the charge is proved; or is the property absolutely forfeit? However, the deified Pius wrote in a rescript to Modestus Taurinus that

if the heirs are prepared to take up the defense, the property should not be confiscated unless the charge is proved.

22

PERSONS UNDER INTERDICT RELEGATED AND DEPORTED

1 POMPONIUS, *Sabinus, book 4:* A chapter of the deified Trajan's rescript to Didius Secundus: "I know that by reason of the avarice of former times the property of relegated persons was claimed by the imperial treasury. But it is otherwise agreeable to my clemency, since I have left this example among the others in which I have regulated the integrity of my accounting."

2 MARCIAN, *Institutes, book 13:* The deified Pius wrote in a rescript that a deported person cannot manumit.

3 ALFENUS, *Epitomes, book 1:* [It was written that] a person who lost his citizenship took away no other legal right from his children, except for what would have come to them from him had he died intestate in possession of his citizenship, that is, his inheritance, his freedmen, and anything else of this kind that can be ascertained. Those things which are granted them, not from their father but from their race, their citizenship, or the nature of things, remain for them unimpaired. Therefore, brothers will become *heredes legitimi* to their brothers and will have tutories over and inheritances from their agnates; for these have been given them not by their father but by his ancestors.

4 MARCIAN, *Institutes, book 2:* Persons relegated to an island keep their children in their power, because they keep all their other legal rights, save only that they are not allowed to leave their island. They also keep all their own property except that which has [specifically] been taken away from them; for it is possible for a [judge] by sentence to deprive those who have been sent into permanent exile or relegated of part of their property.

5 MARCIAN, *Rules, book 1:* Exile is of three kinds: prohibition from certain determined places, imposed banishment so that [the exile] is forbidden all places except for one determined place, or a tie to an island, that is, relegation to an island.

6 ULPIAN, *Duties of Proconsul, book 9:* Among punishments is also deportation to an island, a punishment which takes away Roman citizenship. 1. However, provincial governors are not given the right of deportation to an island, although it is given to the urban prefect; for this is expressly stated in a letter of the deified Severus to the urban prefect, Fabius Cilo. Therefore, provincial governors, whenever they think fit to deport anyone to an island, must put this same on record by sending his name in writing to the emperor so that he may be deported to an island; they [must] then write to the emperor having set out all the considerations in such a way that he may decide whether the [governor's] sentence on the man is to be carried out and whether he ought to be deported to an island. In the meantime, however, while the correspondence is going on, [the governor] should order the person to be kept in prison. 2. The deified brothers wrote in a rescript that for capital crimes decurions of *civitates* should be deported or relegated. Finally, they ordered that Priscus, who had been informed on for homicide and arson and had confessed before interrogation under torture, should be deported to an island.

7 ULPIAN, *Duties of Proconsul, book 10:* There are two classes of relegated persons: There are certain persons who are relegated to an island, and there are those who are simply barred from a province, but are not assigned an island. 1. Provincial governors can relegate to an island, but only if they have an island under them (that is, geographically part of the province which they administer), and they can specially assign that island and relegate persons to it; if, however, they do not have [an island], they may still pronounce that they are relegating [someone] to an island and write to the emperor so that he himself may assign an island. But they cannot condemn [someone] to an island which they do not have in the province that they govern. In the meantime, until the emperor assigns an

island, the person relegated is to be handed over to the military. 2. There is this difference between those deported and those relegated to an island, that a person can be relegated to an island both for a period and permanently. 3. Whether he be relegated for a period or permanently he retains his Roman citizenship and does not lose his capacity to make a will. 4. It is shown in certain rescripts that those relegated for a period should not be deprived of either all or part of their property, and the sentences of those [judges] who have deprived persons relegated for a period of their property, or part of it, have been censured, though not to the extent of invalidating the sentences thus passed. 5. There is in the province of Egypt a type of relegation similar to that to an island: to relegate to the [Great] Oasis. 6. But just as no [governor] can relegate to an island which is not under him, so also he has no right to relegate to a province which is not under him; for example, the governor of Syria will not relegate to Macedonia. 7. However, he can relegate outside his own province. 8. Also he can relegate someone so as to stay in a particular part of the province, so that, for example, he is not to go outside a particular *civitas* or leave a particular region. 9. However, I know that governors generally relegate to those parts of a province which are more deserted. 10. The governor can bar someone from the province which he himself rules, but not from another; and the deified brothers wrote in a rescript to this effect. The consequence of this was that a person who had been relegated from the province in which he had his domicile could remain in the place from which he originated. However, our emperor and his deified father have provided for this. For they wrote in a rescript to Maecius Probus, governor of the province of Spain, that a person could also be barred from the province from which he originated by the governor of the province where he had his domicile. It is also proper that persons who, though not residents of a province, commit an offense there, should come under the force of [this] rescript. 11. There has been doubt whether [a governor], while in charge of the province in which the [accused] is resident, can bar him from the province in which he was born, while not barring him from his own [province of domicile], as it is customary to bar persons from Italy without barring them from their own native land; or whether as a consequence [the governor] is held to have barred him also from the province which he is governing [and is the accused's domicile]. And this will be the more approved view. 12. On the other hand, however, [the governor] in charge of the relegated person's province of origin does not acquire the right to bar him from the province where he resides. 13. If [a governor] passes a sentence to the effect that a person who has committed [an offense] in another province can be relegated by the governor in charge of that province, the result will be that the person relegated must stay out of three provinces, apart from Italy: that in which he committed the offense, that in which he resides, and that of his origin. If he appears to have sprung from more than one province, according to his own standing or that of his parent or patrons, we shall say that he is consequently barred from more than one province. 14. Certain governors, however, have the special privilege that they can bar from several provinces, such as the governors of Syria, and of Dacia also. 15. It is laid down that a person barred from his native land must also stay out of Rome; but, on the other hand, if someone is barred from Rome, it does not appear that he is barred from his native land. And it is so laid down in many constitutions. 16. If someone is barred, not indeed from his native land, but from a particular *civitas*, it has to be seen whether we should say that he is barred from his native land and also from Rome; and this is the prevailing view. 17. Governors have the power and the custom of giving persons who are being relegated [so many] days to leave; for it is the habit to pronounce as follows: "I relegate him from this province and its islands; and he must leave by such and such a date." 18. The deified brothers wrote in a rescript that a person relegated could certainly send a written petition to the emperor. 19. Furthermore, it is customary to sentence certain persons to be barred from remaining within the territory of their native land, or within its walls; or that they should not go outside their native land, or should remain in certain villages. 20. It is customary to bar decurions from their *ordo*, either for a period or permanently. 21. It is also possible to impose on someone the punishment that he is not to seek [high] office; this does not mean that he ceases to be a decurion when it is possible for him to be one, but that he is not admitted to high office. For a man can even be a senator and yet not be able lawfully to seek high office. 22. It is also possible for someone to be barred from a single office in such way however that a man who is barred from one office is unable to seek not only that office but also those which are higher than it; for it is quite ridiculous for a man who is barred from lower offices as a punishment to aspire to higher ones. But a man forbidden the higher offices is not forbidden to seek the lower. If, however, someone be forbidden *munera* by way of punishment, the sentence will be of no effect; for punishment ought not to confer exemption from public duties. Therefore, if someone is barred from office as a punishment, it can be said that, if those offices are involved with the heavy expense of a *munus*, the infamy [imposed] on [the convicted person] will not benefit him on this account.

8 MARCIAN, *Criminal Proceedings, book 2:* But I think that he can be kept from the office, and yet have to meet the expenses.

9 ULPIAN, *Duties of Proconsul, book 10:* The governor can condemn someone not to leave his house;

10 MARCIAN, *Criminal Proceedings, book 2:* but not so as to prevent his making expenditure on the necessities [of life].

11 ULPIAN, *Duties of Proconsul, book 10:* Sometimes a money penalty is imposed on those who harbor relegated persons; sometimes also they themselves are relegated as well, if those others were relegated for a serious crime.

12 MARCIAN, *book . . . :* A person who on being relegated from his native city does not leave is relegated from the province for a period.

13 PAUL, *book . . . :* Someone manumitted by a relegated person may not lawfully remain in Rome, since his patron is not allowed [to remain there].

14 ULPIAN, *book . . . :* A relegated person is one who is barred from a province or the city or the surrounding area, either permanently or for a period. 1. There is a major difference between relegation and deportation; for deportation takes away both citizenship and property, while relegation preserves both, unless there is confiscation of property. 2. Relegation may be carried out by the emperor, the senate, the prefects, and provincial governors, but not by consuls. 3. A person who has lost his citizenship but retains his property is liable to *actiones utiles* by a creditor.

15 MARCIAN, *book . . . :* A deported person loses his citizenship but retains his freedom, and while he loses the *jus civile,* he employs the *jus gentium.* He accordingly buys, sells, leases, hires, barters, lends money, [and does] other things of the same kind. Hence, he may also lawfully pledge those things which he acquired after his condemnation; and in these dealings, his creditors who have contracted with

him in good faith are preferred to the imperial treasury as successors when a deported person has died. A deported person cannot alienate the property which is found [in his possession] at the time of his condemnation. 1. A person deported by a provincial governor without leave of the emperor can both be instituted heir and accept legacies.

16 MARCIAN, *book . . . :* When Ulpianus Damascenus petitioned the emperor that his deported mother be allowed to leave him certain necessaries for his subsistence and the mother also petitioned through her freedman that she should be allowed to leave certain things to her deported son, the Emperor Antoninus sent them a rescript as follows: "It is contrary to custom and public statute that inheritance, legacy, or *fideicommissum* be left by persons of this kind, and it is not proper that their condition should be changed; but because your request has been a dutiful one, I permit you in your last will to leave those persons sufficient for their living and other necessary uses, so that they may take anything which relates to them for those purposes."

17 POMPONIUS, *book . . . :* There is no prohibition on a relegated person's being honored with statues and pictures. 1(18). A relegated person retains his status intact, the property which he has and his power over his children, whether his relegation is for a period or permanent. 2(18, 1). However, deportation is not for a period.

18 (19) CALLISTRATUS, *Judicial Examinations, book . . . :* A relegated person cannot remain in Rome, even if this is not included in his sentence, because it is the common *patria,* nor in a *civitas* in which the emperor is staying or through which he is passing; for only persons who can enter Rome are permitted to look on the emperor, since the emperor is the *pater patriae.* 1. When there is pronounced on freemen a sentence of such a kind that their property is confiscated, such as deportation to an island, then by that sentence itself they lose their previous status and are immediately handed over to the punishments imposed on them by it, unless some connection with treason requires the punishment to be made more severe.

23

THOSE WHO HAVE SERVED THEIR SENTENCE AND BEEN REINSTATED

1 ULPIAN, *Edict, book 38:* A patron who has been deported and reinstated is allowed to inherit from his freedman. 1. But if he be reinstated after condemnation to the mines, would his having been a *servus poenae* extinguish his right of patronage, even after his reinstatement? The prevailing view is that the slavery would not extinguish the right of patronage.

2 ULPIAN, *Opinions, book 5:* If a person reinstated after deportation has recovered his rank by favor of the emperor, he is not, however, [automatically] reinstated in all his property, nor can he be sued by his creditors or in the name of the state. But if, having been offered by the emperor the opportunity of recovering his property as well, he prefers to abandon it and to disembarrass himself of the actions to which he had been liable before his sentence, he cannot do so.

3 PAPINIAN, *Replies, book 16:* The imperial treasury retained the property of a person who had been deported to an island after his punishment had been remitted; it was agreed that his creditors from before the event did not have [rights of] action against him who had formerly been their debtor. But if he also recovers his property along with the grant of reinstatement of his rank, *utiles actiones* will not be necessary, since direct ones are indeed competent.

4 PAUL, *Questions, book 17:* A woman who had been condemned to the mines gave birth to a child whom she had conceived beforehand and was then reinstated by the emperor. It will be more humane to say that the rights of blood relationship [to the child] appear to be restored to her also.

24

DEAD BODIES OF PUNISHED PERSONS

1 ULPIAN, *Duties of Proconsul, book 9:* The bodies of those who suffer capital punishment are not to be refused to their relatives; and the deified Augustus writes in the tenth book of his *de Vita Sua* that he also had observed this [custom]. Today, however, the bodies of those who are executed are not buried otherwise than if this had been sought and granted. But sometimes it is not allowed, particularly [with the bodies] of those condemned for treason. The bodies of those condemned to be burned can also be sought so that the bones and ashes can be collected and handed over for burial.

2 MARCIAN, *Criminal Proceedings, book 2:* If anyone has been deported or relegated to an island, the punishment endures even after his death, nor is it lawful to remove him anywhere else for burial without consulting the emperor, as Severus and Antoninus very frequently wrote in rescripts; and they allowed the same favor to many petitioners.

3 PAUL, *Views, book 1:* The bodies of executed persons are to be granted to any who seek them for burial.

BOOK FORTY-NINE

1

APPEALS AND REFERRALS

1 ULPIAN, *Appeals, book 1:* As everybody knows, the practice of appeals is both frequent and necessary, inasmuch as it corrects the partiality or inexperience of judges; not but what it may sometimes alter well-delivered judgments for the worse, for it is not [necessarily] the case that the last person to pronounce judgment judges better. 1. Is it possible for an appeal to be made against an imperial rescript, if perhaps the provincial governor or some other person consults him and a rescript is sent in reply to that consultation? Does there survive a right of appeal? What, then, if the person who consulted [the emperor] made a false statement? There is extant on this subject a rescript of the deified Pius to the commonalty of the Thracians, in which it is shown that there should be an appeal. The words of the rescript are as follows: "If someone writes something to us, and we send some form of reply to it, those who wish to appeal from that reply will be permitted to do so. For if they shall show that what was written in the letter was false or misrepresented, it will not appear that the case was in any way prejudiced by us in replying to the letter which set out the facts otherwise." 2. Consequent on this, it appears to be laid down by the rescript that there should be no appeal against the judge's consultation, if he does perhaps pronounce an interlocutory judgment that he is going to consult the emperor, since it is possible to appeal after [the issue of] the rescript. 3. If a person makes a mistake in his appeal, as suppose he appeals to one judge when he should have done so to another, we have to see whether the error was at all prejudicial to him. And if, indeed, his mistake was to appeal to a lower judge when he should have appealed to a higher, the error will harm him; if, however, he appealed to a higher judge, the error will be in no way prejudicial to him. This provision is found in many constitutions. Finally, when someone, by rescript of the emperor, had accepted a judge from the consuls and had appealed to the urban prefect, his error was relieved by a rescript of the deified brothers of which the words are as follows: "Since you say that it was through making a mistake that you appealed from the judge, whom you had by our rescript accepted from the most excellent consuls, to our friend Junius Rusticus, the urban prefect, the most excellent consuls may examine the case precisely as if the appeal had been made to them." If, therefore, someone appeals to an equal or a superior judge, but [confuses] one for another, his situation is such that the mistake does not harm him; but if to an inferior judge, it will. 4. The written statement of appeal which is issued should be so drafted as to have written on it both by whom it was delivered, that is, who the appellant is, and against whom and from what judgment.

2 MACER, *Appeals, book 1:* But if someone appeals *apud acta*, it will be sufficient if he says, "I appeal."

3 ULPIAN, *Appeals, book 1:* It has, I know, been asked whether, if someone fails to add to his written statement [of appeal], the name of the opponent against whom he is appealing, he is met by a defense. I think that no [such] defense should lie. 1. This also has come into question if [someone] has a number of opponents, some of whose names are included in the written statement and others not, whether a defense can be made against him by those whose names are not included, just as if he had acquiesced in the judgment so far as they are concerned. I think that since there is a single action, [this] defense should not apply.

2. Certainly, if there are several persons against whom judgment is given, and some of their names are included in the written statement and others not, only those will be regarded as having appealed whose names are included in the written statement. 3. What, then, if he states definite grounds of appeal; is he allowed to depart from them and put forward other grounds; or is he, as it were, bound by one set form? However, I think that when he has once appealed he has freedom to plead his case, even to put forward other grounds of appeal and to pursue his appeal by whatever means he can.

4 MACER, *Appeals, book 1:* An appeal is not allowed from the *exsecutor* of a judgment. 1. An appeal, however, is allowed from a person who is said to have misinterpreted the judgment, provided only that he had the power to interpret it, such as a provincial governor or an imperial procurator, in such a way however that in setting out the grounds of appeal the only point examined is whether the interpretation was according to law. This also was stated in a rescript of the deified Antoninus. 2. A person who has an interest can appeal on the condemnation of someone else. One who has brought and lost [an action] by means of a procurator is such a person; but the procurator may not appeal in his own name. 3. Again, if a buyer fails to obtain ownership, on his yielding the point, his *auctor* can appeal; or if the *auctor* brings an action and loses, the buyer is not to be refused the opportunity of an appeal. But what if a seller, who did not wish to appeal, is not a solvent person? Indeed, and even if the *auctor* appeals but then is seen to be suspect in defending his action, the defense of the action is accordingly to be handed over to the buyer, just as if he himself had been the appellant. 4. This has also been laid down for the case of a creditor when a debtor, after losing his action [against a third party], had appealed and did not defend his action in good faith. This constitution is to be applied if a debtor, having lost concerning a pledge, appeals with the intervention of his creditor; for the debtor creates no prejudice to an absent creditor, and this has been laid down. 5. If a procurator who was present in court has lost, can he himself appeal through a procurator, since it is agreed that one procurator cannot create another? It must, though, be remembered that after joinder of issue, a procurator becomes the principal in the action and on that account he also can appeal through a procurator.

5 MARCIAN, *Appeals, book 1:* It is not possible for there to be an appeal against a judgment passed between other parties, except for just cause, as, for example, if someone allows himself to be condemned to the prejudice of his co-heirs, or some case similar to this (though [the position of] the co-heir is safe even if he does not appeal); again [for example] *fideiussores* on behalf of the person for whom they are sureties. Therefore, the *fideiussor* of the seller will appeal on the buyer's losing his action, even though buyer and seller are content. 1. If a person instituted as heir loses against an opponent bringing the action of an undutiful will, the legatees and those who have received their freedom [in the will] are allowed to appeal if their complaint is that [judgment] was pronounced by collusion, as was stated in a rescript by the deified Pius. 2. The same [emperor] wrote in a rescript that legatees can raise an appeal action. 3. But, indeed, the same is to be said if they allege that a *transactio* was reached to defraud them by the person who had appealed. And there is a rescript to the same effect if the *transactio* took place without an appeal. 4. If someone makes an oral appeal on the same day during the course of court business, this is enough; if, though, he does not do this, there must be reckoned either a two-day or a three-day period for handing in his written statement of appeal.

6 ULPIAN, *Appeals, book 2:* It is not only the person who is being led off to [capital] punishment who is allowed to appeal but also others in his name, not only if he enjoins it but also [if] anyone else wishes to appeal. Nor is a distinction made as to whether [that person] is a relative of his or not; for I believe that for humanity's sake anyone who appeals should be heard. Accordingly, even if he himself acquiesced in the sentence, we do not inquire what is [the appellant's] interest. What, then, if the condemned man holds out against the appeal, and in his rush to doom does not want an appeal to be allowed? I would think that his punishment should be put off until then.

7 MARCIAN, *Appeals, book 1:* When someone, because of the ferocity of the judge, did not give his written statement of appeal to him from whom he was appealing but had made it public, the deified Severus pardoned him and allowed him to raise his appeal action.

8 ULPIAN, *Appeals, book 4:* You should know that a person who has appealed must not

revile him from whom he is appealing; but [if he does] he should be punished. The deified brothers wrote a rescript to this effect.

9 MACER, *Appeals, book 2:* You should know that when a judgment relating to liberty is given, neither a pupil nor a *res publica* can have *restitutio in integrum,* but an appeal is necessary. And there is a rescript to this effect.

10 ULPIAN, *Disputations, book 8:* Persons who have been condemned separately, even if in the same case, must make a number of [separate] appeals. 1. If, when a case is brought in one action which covers a number of counts, anyone is condemned to pay several sums of money which are individually not subject to imperial review, nevertheless, all those sums together have the effect that he can appeal to the emperor. 2. But when [common] grounds are proved against a number of persons to their injury, a single appeal will be sufficient, because they were all sued together under the one heading of proved grounds. 3. Whenever a number of persons are condemned to pay the one sum, the question is raised of whether there is a single sentence and, as it were, [whether] those several parties are required to undertake [to pay] that one sum, so that each of them is liable for the whole, or whether the judgment is split between the persons. And Papinian gave the opinion that the judgment is split between the persons and accordingly that those who are condemned owe [only] their individual shares. 4. But it has been laid down in a rescript that in a common action, whenever one party appeals and the other not, the success of the appellant profits him who did not appeal. However, it must be proved that they had one and the same occasion of defense; but if they are different, the case is altered. As happens with two tutors, if one had exercised his tutelage while the other had not attained it, and the one who had not exercised it appealed; for it is not equitable that he who had acknowledged the sentence, since he knew that he had exercised [tutelage], should succeed because of the appeal of him who had not.

11 ULPIAN, *All Seats of Judgment, book 3:* When money had been paid over on account of a judgment debt at the compulsion of the judge by one who, after lodging an appeal, earned a lighter sentence, he ought to get back the money which he paid.

12 ULPIAN, *Opinions, book 2:* If it be agreed that a *duumvir* was not elected by due process of law but only demanded by the clamor of the multitude and that the proconsul then assented to them, which he ought not to have done, an appeal is entirely superfluous since the case is clear.

13 ULPIAN, *Replies, book 2:* It does not at all harm an appellant that he did not set out in his written statement the part of the sentence from which he was appealing. 1. Nor is it customary for the appeals to be rejected of those who have at least one acceptable ground of appeal.

14 ULPIAN, *Edict, book 14:* If an invalid judgment be given against a will, we must see whether the judge's decision is law. And the deified Pius, when it was alleged that an action had been brought by collusion between parties banded together to the ruin of the legatees and their freedoms, allowed the latter to appeal. We apply this law nowadays, so that they can appeal; but they must bring their action before the same judge who conducted the hearing into the will, if they suspect that the heir did not bring his action in good faith. 1. It has been stated in a rescript that whenever, on an heir not appearing, judgment is given in favor of his opponent, there is no prejudice to legacies or freedoms. This [principle] is contained in a letter of the deified brothers to Domitius in the following words: "A judgment pronounced in the absence of the possessor, or of anyone appearing in his name, does not have the authority of a *res judicata,* except so far as it applies to a person who neglects to be present. For this reason, the [rights of] actions, should they have them, are safeguarded for those persons who have accepted freedom or legacies or *fideicommissa* in a will, just as if no judgment had been given; and accordingly we allow them to bring actions against the successful party."

15 MARCELLUS, *Digest, book 1:* Slaves cannot appeal; but their masters can use the help of an appeal to bring assistance to a slave, and another party can do this in the

name of the master. If, however, neither the master nor anyone else on his behalf appeals, we do not prohibit a slave on whom a heavy sentence has been passed from imploring help on his own behalf.

16 MODESTINUS, *Distinctions, book 6:* The constitutions which speak about receiving or not receiving appeals to the effect that no change is to be made [pending the appeal] have no application to the persons of those whom it is in the public interest to punish immediately on condemnation, such as notorious brigands or stirrers of sedition or leaders of gangs.

17 MODESTINUS, *Rules, book 8:* When a doubly divided judgment is given separately in the one case, for example, one [part] dealing with the principal, the other with the interest, a double appeal is necessary, so that it may not be assumed that the one judgment was acknowledged and the other subject to appeal. 1. If a tutor appeals on being appointed to a pupil, in the meantime a curator will be given to the pupil. However, if the *auctoritas* of a tutor is required, for example, for entering on an inheritance, then a tutor is necessarily appointed for him, because the authority of the curator is useless for this purpose.

18 MODESTINUS, *Replies, book 17:* Lucius Titius lodged an appeal on behalf of his slave, who had been condemned to the beasts. My question is whether the grounds of an appeal of this kind can be stated by a procurator. Modestinus gave the opinion that they can.

19 MODESTINUS, *Problems Solved, sole book:* If a judgment has been given expressly against the rigor of the law, it should not be valid; and accordingly, the case can be restarted from the outset without an appeal. A judgment is given unlawfully if it was specifically given contrary to the statutes, a *senatus consultum,* or a[n imperial] constitution. Wherefore, if anyone appeals against this judgment and has been cut off by a defense, the judgment is certainly not confirmed by this defense. For this reason it is possible for the case to be taken up again from the beginning.

20 MODESTINUS, *Prescriptions, sole book:* A person who holds a tutor suspect and calls in question his excuse for not accepting a tutelage is to be understood as acting in another's name. 1. However, a person appointed as procurator in his own case must appeal within the two-day period, because he is pleading his own cause. 2. The periods for lodging appeals are not relaxed in the case of soldiers; and if, after losing an action, they fail to appeal and to carry out the customary formalities, they are not thereafter given a hearing.

21 PAPIRIUS JUSTUS, *Constitutions, book 1:* The Emperors Antoninus and Verus wrote in a rescript that appeals which were made direct to the emperor, by-passing those to whom appeals ought to be made from the lower courts, were [to be] referred to the [provincial] governors. 1. The same [emperors] wrote in a rescript that an appeal is not properly made to the emperor from a judge whose appointment by the provincial governor the appellant had accepted, and that he should therefore be sent back to the governor. 2. If someone elected as magistrate appeals, his colleague for the time being must carry the burden of both offices; if both appeal, another person must be elected in their place for the time being; and he who appeals without cause shall acknowledge the loss [caused], if the *res publica* has suffered it; but if the appeal is justified and adjudged as such, [the judges] shall assess the damages [against him] to whom [the loss] is to be attributed. But another person must be appointed for the time being in place of the curator who is to administer the corn-supply, so long as his appeal is pending. 3. The same emperors wrote in a rescript that although it is not customary after an appeal for the fruits of land which is the subject of dispute to be put by, nonetheless, it seemed equitable to them that when [the fruits] might be carried off by the opponent of a pupil, they should be entrusted to *sequestres* (stakeholders).

22 PAPINIAN, *Replies, book 2:* A judicial examination which has been remitted to the emperor can be annulled by the person who remitted it.

23 PAPINIAN, *Replies, book 19:* With the consent of the litigants [but] short of a *compromissum,* the party who has lost can appeal from the provincial governor even after a judge has been appointed. 1. Since an imperial procurator, who was not performing the functions of a governor, did not have the right to give judgment in the law suits of private citizens, it was agreed that an appeal against his judgment, which was not binding, was pointless. 2. I gave the opinion that a son-in-power, when judgment had been given against his father regarding certain property which could be acquired through him, could appeal only in the name of his father. 3. It was agreed that a person, who was aware that a peremptory summons [had been issued], had not lodged a proper appeal according to the sequence of established procedure [against the contumacious], since it was in his power, either by appearing or by being defended in court before the appointed day, to refute the intimation of the summons.

24 SCAEVOLA, *Replies, book 5:* An administrator without authorization, or a tutor or a curator, having been condemned in [an action based on] good faith, appealed, and the case was much prolonged. After their appeal was pronounced unjustified, was the interest on the principal sum in the meantime due [to them] because judgment was given so slowly? The opinion [given] was that on the facts as stated, a *utilis actio* should be available. 1. The curator of a young man [under twenty-five], having gone to law against the heirs of the tutor, lodged an appeal; however, since the young man had now reached the age of twenty-five and was engaged in military service, he forbore to pursue the appeal. My question is whether, when the young man has returned from his military service, should he settle the appeal or ought the curator to be summoned for that purpose? The opinion [given] was that on the facts as stated, the soldier himself ought to follow up the action which related to him.

25 PAUL, *Replies, book 20:* The Emperor Alexander to the commonalty of the Greeks in Bithynia: "I do not see how anyone may be prevented from appealing by his judges, since it is permissible [for him] to make use of another route to the same end and to reach me more quickly. But we forbid procurators and provincial governors the use of *injuria* and *vis* against appellants, the restriction of them under military guard and, to put it briefly, the obstruction of their approach to us; they shall obey this my command in the knowledge that I care as much for the liberty of my subjects as for their goodwill and obedience."

26 HERMOGENIAN, *Epitome of Law, book 2:* After a case has been remitted to the emperor, a provincial governor, if the parties agree, can hear the case if the matter is within his judicial competence.

27 HERMOGENIAN, *Epitome of Law, book 5:* If a tutor appeals in a matter concerning a pupil, or a curator in that of a *minor,* his heir ought to follow up the grounds of appeal before he renders accounts; for once the accounts have been rendered, neither the tutor himself nor the curator is constrained to prove the merits of the appeal.

28 SCAEVOLA, *Digest, book 25:* A creditor had had an action with *fideiussores;* but after joinder of issue he himself was not present to plead his case, and after the *fideiussores* had been absolved, his slave appealed. Was the appeal, which the slave lodged in the name of his master, of no effect? The opinion was [given] that an appeal of this kind should not be regarded. 1. A plaintiff ordered by the judge to produce, in accordance with the order of the provincial governor, the account books which he had guaranteed were in his possession, after being granted an extension of time for the sake of the documents, did not produce them either on that day or thereafter, and was consequently condemned in accordance with the publicly read constitution, because he had contumaciously not produced the documents, although he had sworn how important their exhibition was to his case. Could he, after a judicial oath, lodge an appeal? The opinion [given] was that nothing had been adduced to show why he should be denied the help of an appeal. 2. Certain tutors who were appointed in place of the *tutor legitimus* brought an action on the tutelage against him, and when the *arbiter* con-

demned him to less than the equity of the matter demanded, they appealed from his decision; while the appeal was pending, the young man came of age. Since all the prosecution of this [case] would be a matter for adults and they can properly defend a case touching their own affairs, should not the claim of those against whom the appeal was lodged, alleging that the first party to go to law ought to state the grounds of appeal, be admitted? The opinion [given] was that those whose tutelage had been administered should not be barred, if they wished, from pursuing the case. The same [principle] is to be observed in curatories, if the [technical] adult reaches the full age [of twenty-five] in the meantime.

2

PERSONS FROM WHOM IT IS NOT PERMITTED TO APPEAL

1 Ulpian, *Appeals, book 1:* We must deal [with those persons] from whom it is not lawful to appeal. 1. It is indeed pointless to caution you that it is not possible to appeal from the emperor, since it would be to him himself that the appeal would lie. 2. You should know that it is not possible to appeal from the senate to the emperor, as was provided in a speech of the deified Hadrian. 3. If anyone before [the giving of] judgment undertakes not to appeal from the judge, there is no doubt that he has forfeited the help of an appeal. 4. Sometimes the emperor has the custom of appointing a judge on such terms that it is not permitted to appeal from him; as I understand, such judges were very frequently appointed by the deified Marcus. Let us see whether any other person can appoint a judge in these terms; my view is that this is not possible.

2 Paul, *Appeals, sole book:* Is it lawful to appeal against arbitrators who are appointed to examine *fideiussores*? Although in this instance [the appointment is] indeed not subject to appeal, some would consider that his decision can be amended by the person who appointed him.

3

WHO MAY APPEAL FROM WHOM

1 Ulpian, *Appeals, book 1:* The phrase "the appeal lies to the person who appointed the judge" is to be understood as enabling an appeal to his successor. Similarly, if the urban prefect or the praetorian prefect appoints a judge, he who appointed the judge should hear the appeal. 1. A person who entrusts jurisdiction to another has not himself appellate status; for generally speaking, the appeal from the person to whom jurisdiction has been entrusted will lie to that person to whom appeal would have lain from the person who entrusted his jurisdiction.

2 Venuleius Saturninus, *Duties of Proconsul, book 2:* The proconsul can hear appeals from his legates; and if [the legate] has imposed a fine, the proconsul can examine his partiality and pronounce as he thinks best.

3 Modestinus, *Rules, book 8:* When a judge has been appointed by magistrates of the Roman people, of whatever rank, even if they appointed the judge by authority of the emperor who actually nominated him, it is to the magistrates themselves that an appeal will lie.

4

WHEN AN APPEAL IS TO BE MADE AND WITHIN WHAT TIMES

1 Ulpian, *Appeals, book 1:* If a provincial governor registers someone on the list for deportation to an island and writes to the emperor [for permission] to deport him, let us see when an appeal should be made, whether when the emperor writes [back to the governor] or when he is written to [by the governor]. I would think that the appeal should be made

when the governor orders [the condemned] to be taken into custody, having given sentence that [his name] must be submitted to the emperor for deportation. Indeed, it is to be feared that it may be too late if he appeals only when the emperor has assigned an island for him; for, on the confirmation of the governor's sentence, it is then customary to assign an island. Again, it is to be feared that if [the governor] in striving to have the man deported has heaped falsehoods on him [in his letter] to the emperor, his avenue of appeal is cut off. What is [to be done] then? It will rightly be said and humanity suggests that his appeal should not be frustrated at whichever time [he appeals], earlier or later, since he has appealed not against the emperor but against the cunning of the judge. The same method is to be approved in the case of a decurion, whom a governor ought not to allow himself to punish; but he should put him in prison and write to the emperor about his punishment. 1. If anyone has been appointed as tutor, either in a will or by some other person who has the right of appointment, he should not appeal (for this was brought about by the deified Marcus), but he has the right to plead an excuse within a set period, and if this is rejected, only then should he appeal; but [if] he appeals earlier, [it will be] in vain. 2. The case is different with persons who have been called to any public duty or office, although they allege that they have an excuse; for they cannot put forward the grounds for their exemption other than by lodging an appeal. 3. For the most part, governors are accustomed to assign a nominated person to the *ordo*, so that [the decurions] may elect Gaius Seius a magistrate, or so that some other office or public duty may be conferred on him. Therefore, should the appeal be made when the *ordo* gives its vote, or should the appeal be lodged from [the time of] the assignation made by the governor? The prevailing view is that the appeal should be made when the *ordo* votes; for the governor seems rather to have given advice on who should be elected than to have made the appointment himself; so the appeal will eventually lie to him, not from him. 4. But if the governor himself is a member of the *ordo* (as frequently happens), then, when someone is elected by the *ordo*, the appeal will be from him, as if the appeal were from the *ordo*, and not from [the governor] himself. 5. A period of either two or three days from the date of giving judgment should be reckoned for the appeal. What, then, if judgment was given subject to a condition? Do we reckon the time for appeal from the date of the judgment or from that on which the condition is fulfilled? It is indeed true that a judgment should not be given subject to a condition, but if it is so given, what is to happen? And it is expedient that the periods for appeal should be reckoned [as starting] immediately. 6. The [principle] laid down for judgments, that the appeal should be made on either the second or the third day, should also be observed in other cases where, though indeed a judgment is not passed, yet an appeal should and can be made, as is set out above. 7. A speech of the deified Marcus resolved that those days on which an appeal may be made should be *dies utiles* for the particular purpose, if by chance the person from whom the appeal is made gives no opportunity for the written statement [of appeal] to be handed to him; for he says: "That day shall be reserved [as the first available] on which there is the first opportunity of access." For this reason if, after giving judgment, the judge who has pronounced it does not make himself available (as frequently happens), it must be stated that this does not prejudice the appellant at all; for he can appeal when first he does have the opportunity. So if [the judge] does immediately withdraw himself, the same remedy is to be available. 8. What, then, if the state of the hour brings about his retrial? Or what if the judgment was given very late in the day? He will certainly not seem to have withdrawn himself. 9. We always accept [it as] an opportunity for access if he made himself available in a public place; but if he did not do so, is it to be held against someone that he did not go to [the judge's] house, or make his way to his gardens, or even go further to his country house near the city? The prevailing view is that it should not be held against him. For this reason, if there was no opportunity of access in a public place, it will better be said that there was no opportunity of access. 10. If an appellant has had no opportunity of access to the person from whom he will be appealing, he may approach [the judge] to whom he will be appealing. If he does not approach him, we must see whether he is met by a defense; and we follow the practice that if there was opportunity of access to either one of the two, a defense should apply. 11. The accepted period, [for a person acting] in his own case, is two days. How do we distinguish his own case from that of another? It is clear that his own case is one in which the profit or the loss relates to someone in his own name. 12. For this reason, a procurator, unless he is appointed in his own case, shall have a third day; but if appointed in his own case, the prevailing opinion is that he should observe the second day. If, however, he is litigating partly in his own name and partly in that of another, there can be room for doubt whether a two-[day] or three-day period is to be observed. The prevailing view is that he should observe two days so far as his own interest goes and three as regards the other. 13. Tutors, also *defensores rei publicae* and curators of the young or of an insane person, should have the third day for the reason that they are appealing in another's name. From this it appears that a *defensor* may appeal on the third day, provided only that he is bringing the case as *defensor* and not in his own name, although, by bringing his own case under the cloak of another's name, he can appeal on the third day. 14. Julian, in the forty-fifth book of his *Digest*, has written that if a person brings an action concerning a suspect tutor and loses, he ought to appeal within the three-day period, expressly as *defensor* of the pupil. 15. If [a judgment] has been given against someone in his absence, the two-[day] or three-day period must be reckoned from the time it comes to his knowledge, not from the time it was given. We understand this statement, that an absent person may appeal as from the time that [the judgment] comes to his knowledge, as applying only where he was not defended in the case by a procurator; for if the latter did not appeal, it is difficult for the former to be given a hearing.

2 MACER, *Appeals, book 1:* If you bring an action in the capacity of a procurator, lose, and appeal, and your appeal is then pronounced unjustified, it can be doubted whether you must appeal on the second day because, since it was your own appeal that was pronounced unjustified, your interest seems to be involved. But it will more correctly be said that you can appeal on the third day, since you are nonetheless defending another's case. 1. If, however, a person, other than the bringer of the action, but of such a kind that he has an interest, appeals, let us see whether he also can appeal on the third day. It must, however, be said that he ought to appeal on the second day, because the truth is that he is defending his own case. If he should say that it is lawful for him to appeal within a three-day period because he appears to be appealing in another's name, when, wishing his case to appear to be someone else's, he has left himself out, [the truth] is the opposite, because a person who has not conducted the action may not lawfully appeal in another's case. 2. If a person who was defending his right to freeborn rather than libertine status has lost his action and fails to appeal, can his father appeal, especially if the latter states that he is in power? If, indeed, he can do so, as is approved by the majority, he must appeal on the second day, as [if] in his own case. 3. Paul doubts whether, if a relative appeals on behalf of someone sentenced to capital punishment, he can be heard on the third day. It must be said that such a person also should appeal on the second day as if in his own case, because anyone who claims that his own interest is affected is defending his own case.

3 MACER, *Appeals, book 2:* Let us see, when a letter is sent to the emperor [from the judge], if a copy was issued to the litigant and he does not appeal and a rescript is subsequently issued against him; can he appeal from the letter copied to him long since? Because he did not appeal at the time, he is seen as having accepted the truth of what was contained in the letter; nor should he be given a hearing if he says that he was awaiting the outcome of the imperial rescript.

5

WHETHER APPEALS ARE TO BE ACCEPTED OR NOT

1 ULPIAN, *Edict, book 29:* It is not customary for appellants to be heard except those whose interest is affected, or who have been given a mandate, or who are without authorization administering another's business which will however shortly be ratified. 1. But also when a mother appeals as one who is concerned that her son's property was ruined by a judgment, she ought to be granted a hearing as a concession to family piety; and if she prefers to undertake the preparation of a lawsuit, she is not regarded as bringing an obstructive action, even though initially she cannot defend [the case].

2 SCAEVOLA, *Rules, book 4:* An appeal can be made before the judgment if, in a civil action, the judge has given an interlocutory decree that torture should be applied, or if, in a criminal case, he does so contrary to law.

3 PAUL, *Rules, sole book:* A person who has raised an action concerning a suspect tutor, has lost it, and appeals, may lawfully appeal within the three days.

4 MACER, *Appeals, book 1:* The petition of a person who is prevented from pursuing his action because he claims that he has sent a written statement to the emperor and is awaiting an imperial rescript, is forbidden to be heard; and if on this account he appeals, the imperial constitutions forbid his [appeal] being received.

5 ULPIAN, *Appeals, book 4:* It is sufficient if a person whose appeal is not accepted can [simply] say that his appeal has not been accepted; and whatever cause he shows for this, his appeal shall be admitted. 1. But when an appeal has not been accepted, if indeed it is the emperor who should have been appealed to, then a petition must be made to him; but if some person other than the emperor was the appellate authority, he will be the person who should be approached. 2. Again, if anything else took place by way of hindrance after the appeal was accepted, an approach should be made to the person to whom the appeal lies. 3. It is clear that if, after failure to accept an appeal, [the appellant] approaches the emperor rather than the person whom he should have approached, he will be treated just as if he had approached the correct person; and this is stated in the rescripts of our Emperor Antoninus. 4. It is clear that if he approaches one person other than the emperor instead of another, this error will avail him nothing although he is not regarded as having dropped [the appeal]. 5. A person whose appeal has not been accepted must approach either a competent judge or the emperor within the appointed periods for appeal.

6 MACER, *Appeals, book 2:* You must know that it is laid down in the imperial constitutions that when an appeal is not accepted, all matters remain in the same state [as before] and nothing new is done, even if the appeal was against the imperial treasury. It is laid down in the [imperial] mandates that [the appellate authority] who does not accept an appeal must forthwith make clear in a report his view and the reason why he did not accept the appeal, and he must issue a copy of this to the litigant.

7 PAUL, *Appeals, sole book:* If the matter does not admit of delay, an appeal is not permitted to prevent, for example, the opening of a will (as was laid down by the deified Hadrian), the making of a contract for grain for military use, or for the provision of the corn supply, or the entry of a testamentary heir into possession. 1. Again, if something is laid down by the praetor's edict, it is not permissible to appeal so as to prevent its being carried out. 2. Again, an appeal cannot be made to prevent the sale of a pledge.

6

LETTERS OF REPORT WHICH ARE KNOWN AS *APOSTOLI*

1 MARCIAN, *Appeals, book 2:* After the lodging of the appeal, [the judge] from whom the appeal is made must send letters to the person who is to hear the appeal, whether the emperor or someone else; these letters are called letters of report or [*libelli*] *apostoli.* 1. The tenor of the letters is as follows: for example, that Lucius Titius has appealed from the judgment of [Gaius] which was given between him and Seius. 2. However, it is enough for [the appellant] to have sought, urgently and on more than one occasion, [the issue of] letters of report within the time allowed; so that even if he fails to obtain them, this fact itself may serve as evidence; for the [imperial] constitutions require urgency of a person seeking letters of report. It is therefore fair that if it was the fault of the person who should have issued the letters that he did not do so, this should not prejudice the appellant.

7

NOTHING NEW IS TO BE DONE ONCE THE APPEAL HAS BEEN LODGED

1 ULPIAN, *Appeals, book 4:* Once an appeal is lodged, whether it was accepted or not, nothing new should be done in the meantime; this is because the appeal has now been accepted, if it has, or, if it has not been accepted, in order to avoid any prejudice to the consideration of whether the appeal should be accepted or not. 1. Once the appeal has been accepted, however, nothing new may be done until a decision has been pronounced on the appeal. 2. If then anyone happens to have been relegated and appeals, he shall not be excluded either from Italy or from the province from which he has been relegated. 3. By the same reasoning, if anyone has been deported by

a person having the right of deportation or registered [on the list of deportees], he shall not suffer fetters nor any other affront which is suffered by a person who had acquiesced in his sentence; for with the lodging of the appeal, his status is seen as remaining intact. 4. Accordingly, should he have been ordered not to serve as a decurion and he appeals, by the same reasoning, he can take part in meetings, since it is both laid down in constitutions and a matter of law that nothing new is to be done while an appeal is pending. 5. If anyone condemned for a number of crimes appeals against some of [the convictions] and not against others, should his punishment be postponed or not? If, indeed, there were a number of more serious charges in respect of which the appeal was lodged and a minor one in respect of which he did not appeal, then by all means his appeal should be accepted and punishment postponed; if, however, he earned the heavier sentence on the count against which there was no appeal, then by all means the penalty should be imposed.

8

JUDGMENTS WHICH MAY BE RESCINDED WITHOUT AN APPEAL

1 MACER, *Appeals, book 2:* We must remember that if the question is asked whether judgment has been given or not, and the judge of the case states that judgment has not been given, [in that case] even if judgment was given, it is rescinded without the need for an appeal. 1. Again, if there is stated to have been an error in the calculation of the judgment, an appeal is unnecessary, as, for example, if the judge pronounces: "Since it is agreed that Titius owes Seius fifty on one count and twenty-five on another, I accordingly condemn Lucius Titius to pay Seius one hundred." For since the error is one of computation, an appeal is unnecessary, and it is corrected without going to appeal. And if the judge of the case confirms the sentence of one hundred, if, indeed, his reason is that he thinks fifty and twenty-five make one hundred, then it is still the same error of computation and an appeal is unnecessary; but if it was because he says that there were other counts [amounting to] twenty-five, there is room for an appeal. 2. Again, should judgment be given contrary to the imperial constitutions, the need for an appeal is relaxed. Judgment is given contrary to the constitutions when it is pronounced with regard [only] to the legal force of a constitution and not to the legal right of the litigant. For if a judge tells a person seeking to be relieved of the charge of a public duty or of a tutelage by virtue of having children or of age or *privilegium*, that neither sons nor age nor any *privilegium* can serve to relieve one of a public duty or tutelage, he is understood to have pronounced on the basis of constituted law; but had he allowed him to bring proof of his legal rights, but given judgment against him because he found that he had failed to prove his age or the number of his children, he is understood to have pronounced on the legal right of the litigant in which case an appeal is necessary. 3. Again, the constitutions show that when condemnation takes place following a peremptory summons which is neither published nor comes to the attention of the absent [defendant], the judgment is of no effect. 4. Should we make claims against each other before the same judge, if my claim and yours were [both] exclusive of interest, and the judge condemned me before you so that you may first treat me as condemned, it is not necessary for me to appeal on this ground when, in accordance with the imperial constitutions, you cannot ask for execution of judgment against me before judgment has been given on my claim as well. But the prevailing view is that an appeal should be lodged.

2 PAUL, *Replies, book 3:* Paul gave the opinion that a person who was no longer alive at the time judgment was given appears to have been condemned without effect. 1. The same [jurist] gave the opinion, as regards a man who was no longer alive at the time the judge was appointed, that the appointment of the judge was invalid and that the judgment pronounced against him had no force.

3 PAUL, *Replies, book 16:* Paul gave the opinion that an impossible order by a judge was of no moment. 1. The same [jurist] gave the opinion that there is no reason to appeal from a judgment which cannot in the nature of things be obeyed.

9

WHETHER GROUNDS OF APPEALS CAN BE GIVEN BY A THIRD PARTY

1 ULPIAN, *Appeals, book 4:* The question is regularly asked whether grounds of appeal can be given by a third party, a thing which is frequently at issue in financial and in criminal cases. There are rescripts to the effect that this can be done in financial cases. The words of [one] rescript are as follows: "The deified brothers to Longinus. If the person who has appealed entrusted you with the defense of the appeal which Pollia brought against him, and the matter is financial, there is nothing to prevent your replying in his name. If, however, it is not a financial action but a capital case, it may not be conducted through a procurator. But if the case is such that a penalty [ranging] up to relegation customarily follows, you must know that such cases also ought not to be conducted by a third party, but [the principal] ought to be present at the hearing." Clearly, if it is a financial action, whose consequence is ignominy, the matter can be conducted by a procurator. And this must be confirmed in the case of the accuser too, whether he appeals or whether an appeal is made against him. In general, where an action cannot be raised by a third party, an appeal on it cannot be conducted by a third party either.

2 MACER, *Appeals, book 2:* If an absent person's procurator appeals and then renders his accounts, he himself should nonetheless appear. But let us see whether, on the procurator's desisting, the principal in the case can appear, as when a *minor* is concerned; however, it is recognized as better practice that he whose procurator has appealed in his absence ought to be heard in giving his grounds of appeal.

10

IF A TUTOR OR A CURATOR OR AN ELECTED MAGISTRATE APPEALS

1 ULPIAN, *Duties of Consul, book 3:* Any persons, nominated to public duties, who appeal and do not prove their case, are to know that it is on their own heads if the *res publica* has suffered any loss through the delay caused by their appeal. But if it appears that it was unavoidable for them to have appealed, the governor or the emperor will assess to whom this loss is to be ascribed.

2 HERMOGENIAN, *Epitome of Law, book 5:* If a tutor or curator retained [in office] appeals and dies before the case is heard, his heirs must necessarily give the grounds of his appeal because the risk is theirs for the meantime.

11

THE APPELLANT TO DEFEND HIMSELF IN [HIS OWN] PROVINCE

1 ULPIAN, *Appeals, book 4:* The deified brothers wrote in a rescript to Decimius Philo that a person who has appealed should make his defense to any other actions that he has in [his own] province, even if he goes outside it for the purposes of his appeal.

2 MARCIAN, *Appeals, book 2:* For this holds good for those persons who are absent for reasons of state so that they are not under the necessity of defending themselves.

12

[AN APPELLANT] MAY BE REQUIRED TO PLEAD ANOTHER ACTION BEFORE [A JUDGE] FROM WHOM HE IS APPEALING

1 ULPIAN, *Appeals, book 4:* Let us see whether, if a person appeals from a judge in one action, he is required to accept the same judge in another. We nowadays follow the legal principle that even if an appeal has been lodged, a person is still compelled to plead any other actions that he has before the same judge from whom he appealed. Nor is he to use this as a pretext on the grounds that he ought not to go to law before a resentful judge, since it is possible for him to make a fresh appeal.

13

IF DEATH OCCURS WHILE AN APPEAL IS PENDING

1 MACER, *Appeals, book 2:* On the death of the appellant, if he has no heir, then the appeal, whatever sort it was, becomes void. If, however, there is an heir to the appellant, then, if it is not in any other party's interest for the grounds of appeal to be given, he is not to be obliged to pursue the appeal; if, however, it is in the interest of the imperial treasury or of the other party against whom the appeal was made, the heir must necessarily give the grounds of appeal. It is not in the interest of any party when, for example, the deceased was relegated without confiscation of property. For if he was relegated with confiscation of property, or deported to an island, or condemned to the mines, and he dies after having lodged an appeal, our emperor Alexander sent a rescript to the soldier Plaetorius as follows: "Although, by the death of the person charged while the appeal is pending, the offense is extinguished, yet the sentence given as regards part of his property is made public, and the person who has the benefit of the succession can only win his case against it if, in giving grounds of appeal, he reveals an unfairness in the sentence." 1. Again, if a tutor dies after lodging an appeal in an affair concerning his pupil, his heir must necessarily give the grounds of appeal, even if the heir has rendered the accounts of the tutelage, because it is sufficient that, at the time of his death, he was under an obligation to give the grounds of appeal. However, the deified Severus and Antoninus wrote in a rescript that a tutor should not be compelled to give grounds for appeal after rendering his accounts.

14

RIGHTS OF THE IMPERIAL TREASURY

1 CALLISTRATUS, *Rights of the Imperial Treasury, book 1:* There are various reasons for which a denunciation is customarily made to the imperial treasury. For either someone makes a declaration that he cannot take that which was left to him tacitly, or he is forestalled by someone else and denounced; or because the death [of someone] is not avenged by his heirs; or because an heir is denounced as unworthy; or because the emperor has been instituted heir and the will or codicils are reported to have been purloined; or because someone is stated to have found treasure; or to have bought from the imperial treasury something of great price for a lesser one; or [it is stated that] the imperial treasury has been defeated by *praevaricatio*; or that someone has died while under a capital charge; or that someone has been charged even after his death; or that a house has been destroyed; or that an accusation has been abandoned; or that the object of a lawsuit is offered for sale; or that a penalty is due to the imperial treasury under a private contract; or that some offense has been committed contrary to statute. 1. Do insolvent properties belong to the imperial treasury by virtue of the civil law? Labeo writes: "Those things also which are insolvent belong to the imperial treasury by virtue of the civil law." Against his view, however, are the words of the praetor's edict that such property is sold, if nothing can be obtained from it for the imperial treasury. 2. The deified Pius wrote in a rescript to Coelius Amarantus that denunciation of *bona vacantia* terminates after four years, and that this period ought to be calculated from the date on which it becomes established that there exists no *heres* or *bonorum possessor*. 3. However, the prescription of twenty years, which is also observed in relation to the property

of persons registered as "wanted," is normally reckoned, under a constitution of the deified Titus, from when any [of that property] could have belonged to the imperial treasury. 4. But actions which are raised at once and prolonged beyond the twentieth year can be adjourned even after the twentieth year. 5. Again, those cases which are shown to have been reported by an earlier informer can be denounced to the imperial treasury even after the prescriptive period of years which we have stated.

2 CALLISTRATUS, *Rights of the Imperial Treasury, book 2:* In certain cases, the reputation of those undertaking a denunciation is not injured by it, as, for example [the reputation] of those who [denounce but] not for the sake of obtaining a reward, again those who denounce their adversary for the sake of revenge, or because someone is pursuing a case in the name of his *res publica;* and it is laid down in many places in the imperial constitutions that these [principles] are to be observed in this manner. 1. The deified Hadrian wrote a rescript to Flavius Arrianus in these words: "There is no doubt that someone who does not produce documents pertaining to a plea of the imperial treasury, although he has the ability to produce them, ought to suffer for this, so that unless the truth is found to be otherwise, those [documents] which would have injured his case will be presumed to have been withheld [deliberately]. But there ought to be no doubt apart from this that [the documents] should not injure him in any other matter than that in which they were missing." 2. Again, the deified brothers wrote a rescript in reply to a petition of Cornelius Rufus that the documents must be published whenever an inquiry is conducted about the right to take [under a will] or the right of ownership or some other similar pecuniary affair, [but] not if a capital case is involved. 3. The senate decided that if neither the informer nor the person in possession puts in an appearance after being called upon by three summonses, the *fideiussores* of the informer are liable, and thereafter the right of bringing a public action is taken away from him; but the possessor's right is to be the same as if he had not been denounced at all. 4. The deified Hadrian wrote in a rescript that whenever an informer, after being ordered to attend, fails to do so, and it is not proved that this was brought about by the dishonest conduct of the possessor, judgment should be given in favor of the possessor in such terms that the judgment may include that this edict has covered informers also. 5. The deified Pius wrote in a rescript to Caecilius Maximus that his father's constitution, by which an informer was compelled to publish the name of his mandator and, unless he published it, that he was to be put in prison, had the effect, not that an informer might evade punishment if he had a mandator, but that the mandator also should be punished just as if he himself had laid the information. 6. Our own Emperor Severus Augustus has laid down that slaves informing on their masters should not be given a hearing but subjected to punishment and that freedmen who are mandators of actions against their patrons should also be inflicted with punishment by the provincial governors. 7. There are a number of imperial rescripts in which it is provided that no one is to be prejudiced through his error because he informed on himself in ignorance of his rights. However, there is extant a rescript of those same emperors from which it appears that [the rule that] informing on oneself is not to prejudice anyone can be upheld if and only if the person concerned is of such a nature that he or she could be ignorant of his rights because of rustic simplicity or [membership of] the female sex.

3 CALLISTRATUS, *Rights of the Imperial Treasury, book 3:* A person is not understood to have fraudulently evaded the law if he has been openly [not tacitly] asked to restore [something]. But when some one had written in his will: "I ask you to keep your word in that which I requested of you, and I ask you in the name of God to carry it out," and it was questioned whether this should be understood as made openly, Julian gave the opinion that what was being sought from the heirs by words of this kind was not apparent. However, [he said] that the question customarily asked was: Just when may someone be understood to have given his word for the fraudulent evasion of the law? And the point had very nearly been reached when evasion of the law was held to take place not when someone was asked [to restore something] in a will or in codicils, but only when he put himself under an obligation by a private guarantee and a holograph to make good the *fideicommissum* to a person [legally] unable to take it. It could accordingly be said that from the words quoted above, there had not been fraudulent evasion of the law. 1. If anyone should have been asked [to perform a *fideicommissum*] both openly and tacitly, it used to be debated which [of the two] should rather prevail: Should it prejudice him that he had been asked tacitly or benefit him that an open request had been made? And the deified Hadrian wrote a rescript on the subject [to the effect] that anyone who had openly received a *fideicommissum* should not

be regarded as having given his word for the fraudulent evasion of the law. 2. But the subject at issue is when does it appear that a fraud has taken place, that is, whether regard should be had to the event or to the intention, if, say, at the time there was a tacit *fideicommissum,* the person to whom it was ordered there should be restoration was not in a position to take [the property], although, at the time of the death, he had the power to do so, or vice versa. It was agreed that regard should be had to the event. 3. Tacit *fideicommissa* frequently come to light in this manner, if a holograph is produced in which the person chosen to perform the trust has undertaken to hand back what comes to him from the property of the deceased. But, indeed, there may be other very clear proofs to the same effect. 4. When by reason of a tacit *fideicommissum* property belongs by right to the imperial treasury, all those things which were disposed of competently in the will are valid, as the deified Pius wrote in a rescript. 5. The deified brothers wrote in a rescript that in sales of property for the benefit of the imperial treasury honesty and carefulness are to be demanded of the [fiscal] procurator and that fair prices are to be established on the basis not of a past sale but of an up-to-date valuation; for just as by careful cultivation the values of landed estates are increased, in the same way, if they have been managed with less care, the [values] are necessarily reduced. 6. When a five-year period for which someone has bound himself on behalf of a public contractor has expired, he is not liable in the case of the following [five-year] period, and this is set out in imperial rescripts. The deified Hadrian also wrote a rescript in these words: "It is a truly inhumane practice whereby farmers of the public taxes and lands are held liable again if [the contracts] cannot be renewed at as high a figure. For farmers will more readily be found if they know that if they should wish to leave at the end of the five years, they will not be kept on [against their will]." 7. If the imperial treasury succeeds to a later creditor, it enjoys [only] the same legal rights which would have been enjoyed by the person to whom it has succeeded. 8. There are many imperial rescripts in which it is provided that the imperial treasury can only sue the debtors of its debtors if the principal debtors default, or if it is unequivocally proved that their debts were for the benefit of the imperial treasury's account, or if the debtors are being sued under a contract made with the imperial treasury. 9. The deified Hadrian wrote a rescript to Flavius Proculus that when [a slave], who is alleged to be part of property belonging to the imperial treasury, appeals for his freedom, judgment is [to be] given in the presence of and with the participation of those who customarily take part in the business of the imperial treasury. Cases of this kind involving free status, if they have not been decided in the presence of the fiscal advocate, [must be] heard again from the beginning. 10. If treasure is discovered in places belonging to the imperial treasury or in public places, burial places, or in funerary monuments, the deified brothers laid down that a half share of it might be claimed by the imperial treasury. Again, if [treasure] is found on property possessed by the emperor, a half share is likewise claimed by the imperial treasury. 11. But no one is compelled to inform on himself for having found treasure, unless a share of that treasure is owed to the imperial treasury. But a person who finds treasure in a place belonging to the imperial treasury and conceals the share belonging to the treasury is compelled to pay the whole amount and as much again.

4 ULPIAN, *Edict, book 6:* In cases involving the imperial treasury, those who come to an agreement with their denouncers are taken to have acknowledged liability if they have paid them any money, even a small amount.

5 ULPIAN, *Edict, book 16:* If an imperial procurator sells anything, even though he promises twice or three times the price in the case of eviction, the imperial treasury will only pay the simple sum. 1. If a person who has been granted the right of selling off fiscal property sells off anything belonging to the imperial treasury, it immediately becomes the property of the buyer, provided that he has paid the price.

6 ULPIAN, *Edict, book 63:* The imperial treasury, when it succeeds to the legal right of a private person, enjoys that person's rights as regards the period before its succession; but after it has succeeded, it will have its own privilege. But [is it privileged] as soon as the title begins to belong to it, or after it has sued the debtor, or after the title has been registered among those of the debtors? And, indeed, the imperial treasury sues for interest due to itself, even if the sums due are trivial from the time when it sues the particular debtor who admits [his liability]. But as regards the privilege, there are differing rescripts; my own view, however, is that there is scope for privilege from the time when the title has been registered among those of the debtors. 1. The accounts of the emperor and empress customarily have the same privilege as is applicable to the imperial treasury.

7 ULPIAN, *Edict, book 54:* If the imperial treasury should raise a question concerning any person's status, the fiscal advocate must be present. For this reason the deified Marcus wrote in a rescript that, if judgment has been given without [the presence of] the fiscal advocate, the action was of no effect and the hearing must take place [again] from the beginning.

8 MODESTINUS, *Rules, book 5:* The [slave] managers of property claimed for the imperial treasury cannot be sold by the [fiscal] procurators, and it is contained in rescripts that if they are sold off the sale is made void.

9 MODESTINUS, *Replies, book 17:* Lucius Titius made his sister heir to three quarters of his estate, [and] his wife Maevia and his father-in-law to the remaining shares; his will was voided by the birth of a posthumous child, which itself shortly died, and thus the entire inheritance devolved on the mother of the posthumous child. The testator's sister accused Maevia of poisoning Lucius Titius; when she had lost her action, she appealed. Meantime the woman charged died, but, nonetheless, letters of report were issued. Do you think that with [Maevia's] death, cognizance of the appeal should be sanctioned because of the inheritance being sought? Modestinus gave the opinion that while, with the death of the woman accused, the [criminal] charge was extinguished, it was competent for the imperial treasury to pursue that property which could be proved to have been obtained by wrongdoing.

10 MODESTINUS, *Prescriptions, sole book:* I do not think that a person who in debatable questions heedlessly gives replies against the interests of the imperial treasury commits an offense.

11 JAVOLENUS, *Letters, book 9:* No property can belong to the imperial treasury other than that which will remain after creditors have been paid off; for every man's property is taken to be what remains after the payment of his debts.

12 CALLISTRATUS, *Judicial Examinations, book 6:* Freedom is taken away from those condemned to the mines, since they may even be punished by flogging like slaves. The deified Pius wrote in a rescript that the imperial treasury certainly did not acquire anything through a person of this kind; and accordingly, he wrote, any legacy to a person subsequently condemned to the mines did not belong to the imperial treasury, and, as he says, they are *servi poenae* rather than slaves of the treasury.

13 PAUL, *Lex Julia et Papia, book 7:* In an edict of the deified Trajan, which I have set out above, it is indicated that if anyone, before his case is denounced to the state treasury, should have admitted that he did not have the right to take the property which was in his possession, he should pay part of it to the imperial treasury and keep part himself. 1. The same emperor subsequently indicated in an edict that whoever had admitted that there had been left to him, openly or tacitly, [something] which he could not [lawfully] take, and had proved that it already belonged to the imperial treasury, even if it were not in his possession, should have a half share of that which was collected by the prefects of the state treasury. 2. The reason preventing the right to take [under a will] is of no consequence. 3. But it is [property] which lies hidden that ought to be denounced, not that which evidently belongs to the imperial treasury. 4. It used to be thought right that [this] reward did not descend to the heirs of a person who had denounced himself; but the deified Hadrian wrote in a rescript that even if the person who had denounced himself died before the property which he had denounced was made over to the imperial treasury, the reward should be granted to his heir. 5. There is extant a letter of the same Hadrian to the effect that if someone who could have informed on himself is overtaken by death, his heir, if he makes a denunciation, may obtain the reward, "provided, however," in his words, "that it shall be clearly apparent that the deceased was intending voluntarily to denounce himself." If, however, he conceals the matter in the hope that it may remain hidden, his heir shall receive nothing more than the common reward. 6. Again, the deified brothers wrote in a rescript that the heirs of persons to whom a tacit *fideicommissum* had been left could denounce themselves in accordance with the benefit of Trajan, if and only if the person to whom [the *fideicommissum*] had been given had been overtaken by death and accordingly, because his time had run out, could not denounce himself. 7. When, before a will was opened information of a tacit *fideicommissum* had been laid by those who had accepted the tacit trust, and thereafter, following the opening [of the will], a denunciation was made by the *fideicommissarius*, the deified Antoninus ordered that his formal avowal was to be accepted; for the headlong haste of the denunciation of the previous party was not worthy of a reward, and when someone announces that he is not taking [something] he is rather seen as giving evidence of his own legal standing than as denouncing someone else. 8. The benefit of Trajan applies to those who are unable to take something left to themselves in a deceased person's will. For this reason I cannot inform on that which has been left to my slave. 9. [It has been stated that] persons who are turned away as unworthy are to be ruled out for a

reward of this kind; that is, those who have been bringing an action in respect of an undutiful [will], or have stated the will to be forged, and who have, up to the end of the proceedings, assailed the will. 10. The deified Hadrian, the deified Pius, and the deified brothers have written in rescripts that a person who has denounced himself in error, when he was able to take the whole sum, is not to be prejudiced by this.

14 GAIUS, *Lex Julia et Papia, book 11:* The imperial treasury is said to have confiscated entire inheritances under the *senatus consultum Silanianum* without preserving manumissions and legacies. It is not apparent that there is any good reason for this, since, when inheritances are forfeit to the imperial treasury for any other reasons of whatever kind, manumissions and legacies remain valid.

15 JUNIUS MAURICIANUS, *Lex Julia et Papia, book 3:* The senate resolved that if an informer seeks an annulment because, he says, he has made a mistake, the same judge should conduct a hearing into whether there is just cause for an annulment, and if he shall seem to have made a mistake, [the judge] may pardon his lack of judgment, but if he seems to have committed calumny, he shall pronounce that [crime] committed, and the accuser's situation shall be the same as if he had brought an action and abandoned it. 1. If anyone suborns an informer, he is to pay into the state treasury the amount which the informer would have received by way of reward if he had been successful. 2. The deified Hadrian wrote in a rescript that an informer who, on being cited, fails to reply to the summons, ought to suffer the same penalty as that to which he would have been liable if he had not proved his case. 3. The senate in Hadrian's time resolved that when someone denounces himself to the state treasury because he is not able to take [under a will], the whole amount should be gathered in to the state treasury and from it a one half share returned to the man himself in accordance with the benefit of the deified Trajan. 4. But if an informer, after being three times ordered to attend by summonses from the prefect of the state treasury, refuses to come, judgment is to be given in favor of the person in possession and present; but the man who, after being thus ordered to attend, does not do so, while the possessor does appear, is to be required to pay the amount which would have remained with the state treasury as a result of the denunciation he made if he had made good his declaration. 5. The senate resolved that a person from whom the imperial treasury recovered possession of an entire inheritance, or of all the legacies, should submit his accounts to the state treasury in precisely the same way as they should be submitted by someone from whom part of an inheritance or of a legacy is recovered. 6. If anyone is proved to have submitted falsified accounts, the prefect of the state treasury may investigate his case and order that there be paid to the state treasury a sum of money equal to the amount of the fraud he detects.

16 ULPIAN, *Lex Julia et Papia, book 18:* The words of the deified Trajan are: "whoever makes a declaration." We should understand "whoever" as applying to both male and female; for women also, although they are forbidden [to lay] informations, are still allowed, under the benefit of Trajan, to denounce themselves. And it will equally make no difference what the age is of the person who denounces himself, whether he is of full age or a pupil; for pupils also are allowed to denounce themselves [in respect of wills] from which they do not take.

17 MODESTINUS, *Punishments, book 2:* To sum up, you should know that claims for all penalties due to the imperial treasury are put after [those of] creditors.

18 MARCIAN, *Informers, sole book:* Women, because of the weakness of their sex, cannot make denunciations, as is provided in imperial constitutions. 1. Again, men of senatorial rank cannot make denunciations. 2. Again, condemned persons cannot make denunciations, as the deified brothers wrote in a rescript concerning a man who had been beaten with rods and sent to forced labor. 3. Again, by the imperial constitutions, persons who have been sent to the mines are forbidden to make denunciations. And this is so that they cannot in their desperation easily have recourse, without grounds, to laying an information. 4. But it is laid down by rescript that those cases which they began to denounce before their condemnation, can be pursued by them even after condemnation. 5. Veterans also are forbidden by the imperial constitutions to be informers because of the honorable nature especially of their completed service. 6. Again, soldiers are forbidden to make denunciations because of the honorable nature of their occupation. 7. But anyone can denounce a case common to himself and the imperial treasury, that is, [he can] make a claim, and he does not become infamous thereby, even if he fails to win his case. 8. Again, the deified Severus

and Antoninus wrote in a rescript that those who have been tutors or curators ought not to denounce cases relating to the pupils or minors who were their [charge]. The principle stemming from this is to be observed in the case of an unauthorized person who has administered another's affairs as though being his procurator; and the same emperors wrote a rescript to this effect. The same [emperors] decreed that it was not forbidden by any constitution for a procurator to be interrogated, but that [it was forbidden] for him to accuse the person whose affairs he has administered. They also laid down by rescript that any tutor who has either laid an information or ordered [this to be done], should be very severely punished. 9. Nor indeed should someone who has sold something lay an information about the same, either himself or through someone subordinate, lest otherwise he might suffer a punishment suited to his status, as was reportedly laid down. 10. Papinian writes in both the sixth book and the eleventh book of his *Replies* that money due to the treasury is to be taken away from one who, when he was a creditor, accepted it in discharge of a debt, if and only if he either knew, at the time he accepted it, that [his debtor] was also a public debtor, or he subsequently learned [this] before he spent the money. However, the approved view is that the money should in all circumstances be taken from him, even if he had no such knowledge when he spent it; and subsequently, certain emperors have written in rescripts that a direct action is available when money has been taken away, as Marcellus also writes in the seventh book of his *Digest.*

19 PAPINIAN, *Replies, book 10:* Finally, it is agreed that interest should not be answered for when money is called in, because the property not the person is being sued.

20 PAPINIAN, *Replies, book 11:* But, when money has been called in, a *utilis actio* will be granted against a *fideiussor* who has been set free.

21 PAUL, *Questions, book 3:* Titius, who owed me money under pledges while being a debtor to the imperial treasury, paid me what he owed; subsequently, the imperial treasury used its right to take the money from me. Had his pledges been released? Marcellus rightly considered that if the imperial treasury took away what had been paid me, release of the pledges was not valid. Nor do I think that we should admit the distinction [drawn by] those who think that it matters whether that which was paid be claimed back or an equivalent sum.

22 MARCIAN, *Informers, sole book:* Things which are the subject of dispute ought not to be sold off by an imperial procurator, but their sale should be postponed, as the deified Severus also and Antoninus wrote in rescripts; and on the death of a person charged with treason, his heir being prepared to vindicate the innocence of the dead man, they ordered the selling-off of his property to be suspended, and in general forbade anything which was the subject of a dispute to be sold off by a procurator. 1. However, procurators can sell off things bound in pledge. But if things were assigned beforehand to another person by right of pledge, the procurator ought not to harm the rights of the creditors; but if anything in the property exceeds [the debt pledged], the procurator is allowed to sell it under the rule that he should first satisfy the earlier creditors and that if there is anything over, it should be paid to the imperial treasury, or if the imperial treasury takes the whole, he himself should pay [the creditors]; or simply, if the procurator has carried out a sale, he shall order the money which is proved to be due to a private creditor, to be paid to him. The deified Severus and Antoninus wrote a rescript to this effect. 2. The deified Pius wrote in a rescript that he would not take over actions as gifts [in lieu of cash], even if someone promises the profits of what is left [to the emperor]; nor would he accept the gift of part of the profits. He added also that the person [making this offer] had deserved punishment for so base and odious a scheme, unless it appeared oppressive to impose a punishment on someone coming forward of his own accord. 3. Just as no one is compelled to denounce a case, so an informer is not given freedom to choose whether to drop [the action], and the deified Severus and Antoninus wrote in a rescript to this effect; and [they wrote] that the position was the same even if he should have made his denunciation at the mandate of a third party. They clearly stated by rescript that an informer wishing to drop an action should be given a hearing if he was complaining that his mandator had withdrawn.

23 CALLISTRATUS, *Rights of the Imperial Treasury, book 2:* The deified brothers wrote in a rescript that an informer who had begun to raise an action on his own, with no mention made of a mandator, should be punished, if he subsequently drops [the action], alleging that the mandator in the case has withdrawn.

24 MARCIAN, *Informers, sole book:* It is not only the informer who is punished if he fails to prove his case but also his mandator whom the informer has a duty to reveal.

25 ULPIAN, *Sabinus, book 19:* It was decreed and laid down by the Emperor Severus that in denunciations relating to the imperial treasury a person is in no wise to be compelled to prove from what source he has [received something], but that an informer must prove what he puts forward.

26 ULPIAN, *Sabinus, book 31:* When someone charged with a capital offense had emancipated his son, so that he might enter on an inheritance, it was laid down by rescript that this did not appear to have been done to defraud the imperial treasury, because there was no acquisition [by the person charged].

27 ULPIAN, *Edict, book 34:* When a husband failed to prosecute the death of his wife who had been murdered, the deified Severus wrote in a rescript that her dowry, insofar as it belonged to the husband, should be forfeit to the imperial treasury.

28 ULPIAN, *Disputations, book 3:* If a person who had pledged to me his present and future property comes to an agreement with the imperial treasury, you should know that Papinian gave the opinion that, in respect of property subsequently acquired, the imperial treasury has the stronger claim; and this has been laid down in a constitution. For the imperial treasury takes precedence over the action arising out of the pledge.

29 ULPIAN, *Disputations, book 8:* The position of one who has corrupted his informer is such that he is regarded as having lost the action; for it is so laid down in cases touching the imperial treasury. But the preferable opinion is that this penalty is applicable against the man himself who has bought off his accuser; for the rest, it ought not to descend against his heir. For the action does not expire from the time when it was bought off or a condemnation appears to have been made, but there must first be agreement on the charge, and judgment must be given. Clearly, if an action should happen to be raised about a case that needs to be started afresh, on which judgment has once been given on account of the corruption of the informer, the death of the corrupter will not hinder the possibility of raising the action and of the case being started afresh; for here it is the case that is being reinstated, not the penalty. 1. It is agreed that a person who has stated that a will is forged can enter on the inheritance; but if actions have been refused him, the imperial treasury will have scope [for an action]. 2. Obligations, which someone by entering on [an inheritance] extinguishes by merger, are not restored; for our emperor and his father wrote in a rescript in the case of a man who, after entering on an inheritance, failed to avenge the death of the deceased, that obligations once merged are not revived.

30 MARCIAN, *Institutes, book 3:* The Emperors Severus and Antoninus have written in a rescript that imperial procurators are not to alienate [slave] managers of property which has fallen to the imperial treasury; and if they have been manumitted, they are recalled to slavery.

31 MARCIAN, *Institutes, book 4:* The deified Commodus wrote in a rescript that the property of hostages, like that of prisoners of war, should in all circumstances be collected for the imperial treasury.

32 MARCIAN, *Institutes, book 14:* But if they [the hostages] have accepted the practice of [wearing] the Roman toga and always conduct themselves as Roman citizens, the deified brothers wrote a rescript to the procurators in the succession office that there was no doubt that the right of their heirs, by reason of the imperial benefit, was distinguished from [their own] status of hostage. Therefore, the same right should be reserved for them as that which they would have if they had been instituted heirs by Roman citizens under the civil law.

33 ULPIAN, *Replies, book 1:* [It is laid down that] he who has entered on the inheritance of a debtor to the imperial treasury has begun to be subject to the privileges of the imperial treasury.

34 MACER, *Criminal Proceedings, book 2:* The Emperors Severus and Antoninus wrote a rescript to Asclepiades as follows: "When a charge was brought against you, you made no defense, preferring to buy off the sentence. You were deservedly ordered to pay fifty solidi to the imperial treasury; for by failing to take part in the judicial examination of your own case, you exposed yourself to this penalty. For [the principle] must be maintained that those against whom fiscal actions are set on foot must come to the defense of their case in good faith and not seek to buy

off their opponents or judges."

35 POMPONIUS, *Letters, book 11:* Julian has written: If a private citizen alleges that Lucius Titius's inheritance belongs to him while the imperial treasury is the second claimant to the same inheritance, should the claims of the individual creditors not be held back to any greater extent [than usual], or should the right of the imperial treasury be examined first, and the actions of other persons be held up, to avoid prejudice to the public interest? And the latter is expressly stated in *senatus consulta.*

36 PAPINIAN, *Replies, book 3:* When landed estates have been sold off by the imperial treasury, it is agreed that the tribute [due] for the period that is past on those same estates falls as a burden on the buyer.

37 PAPINIAN, *Replies, book 10:* It has been agreed that a penalty is not to be sought by the imperial treasury unless the [private] creditors have recovered their money; the effect of this is not that the imperial treasury loses the right which it has in common with the private [creditors], but that its privilege in [seeking] a penalty is not to be exercised at the expense of the creditors.

38 PAPINIAN, *Replies, book 13:* The imperial treasury failed in an action over a forged will; but before that action was decided, it was agreed, following the subsequent laying of information by another person, that there was no heir to the property. I gave the opinion that after the first action, the fruits ought not to have been consumed; for once an action was raised, the appointed heir did not come within the scope of the benefit of the *senatus consultum.* 1. I gave the opinion that a person who asserted, although he had not been able to prove it, that money belonging to the imperial treasury, but held by another party, related to the management of his own time, had not been acting in the rôle of an informer because he had been pursuing his own case.

39 PAPINIAN, *Replies, book 16:* The property [of a condemned person] should not be awarded in the sentence to the imperial treasury if the penalty falls short of permanent exile. 1. I gave the opinion that a man who asked that the risk of a common condemnation should be divided [among the accused] on the grounds that after the alienations, which they had fraudulently made, had been revoked, the joint judgment debtors would be solvent, did not appear to have denounced a case involving money to the imperial treasury.

40 PAUL, *Questions, book 21:* A *fideicommissum* was given to an heir as follows: "I ask you to give Titius the farm which I asked you about." Should Titius be unable to take, the heir will not avoid the penalty for a tacit *fideicommissum;* for it is not leaving something openly if it cannot be ascertained from the will when it is read. In just the same way, a man does not make an open gift if he writes in these terms: "I ask you, my heirs, to carry out faithfully that which I solicited of you." Indeed, in the former example [the testator] is seen as having devised a more serious fraud in seeking to circumvent, not merely the statute but also the construction put upon the statute, which applies to a tacit *fideicommissum;* for although he denominates the farm, yet it is impossible to determine what was asked of the heir, since the diversity of [possible] things makes the legacy unclear. 1. Should a patron receive a tacit *fideicommissum* in such a way that he accepts responsibility for it out of his own share [of his freedman's estate], he is regarded as no longer acting fraudulently, because he is paying at his own expense.

41 PAUL, *Replies, book 21:* It is laid down that a person who has purchased *bona vacantia* from the imperial treasury ought to defend [any] action which was competent against the deceased.

42 VALENS, *Fideicommissa, book 5:* Arrianus Severus, the prefect of the state treasury, when the property of a person, who had been asked to hand over a tacit *fideicommissum* to someone who failed to take it, had been confiscated, decreed that the man to whom the *fideicommissum* had been left had nevertheless the right of making a denunciation under the constitution of the deified Trajan. 1. However, because some ungrateful persons, contrary to [the spirit of] the benefit of the deified Trajan, after making a formal declaration about a tacit *fideicommissum,* do a deal with those in possession [of the property] and, [though] called by three summonses, do not attend, the senate resolved that there be exacted from a person who had done this the same amount as should have remained with the state treasury as a result of the case in which he had made a denunciation, if he had fulfilled his declaration. Should the possessor also be convicted before the prefect of fraudulent evasion of the law, from him also is exacted what on conviction [on the original charge] he ought to have paid.

43 ULPIAN, *Fideicommissa, book 6:* Our emperor wrote in a rescript that the imperial treasury has actions *in rem* arising out of a tacit *fideicommissum.*

44 PAUL, *Views, book 1:* A person who denounces something to the imperial treasury in order to safeguard his own case is not an informer.

45 PAUL, *Views, book 5:* Things alienated, not only by gift but by any other means, to defraud the imperial treasury are revoked; and the rule is the same even if [revocation] is not claimed; for fraud is punished in all cases equally. 1. The property of those who have died in custody, or in chains or fetters, is not taken away from their heirs, whether they have died testate or intestate. 2. The property of a person who has committed suicide is not seized for the imperial treasury before it has been established what charge caused him to lay hands on himself. The property of a person who has committed suicide and laid hands on himself because of some crime committed is forfeit to the imperial treasury; but if he committed [suicide] out of *taedium vitae*, or from shame over a debt, or from inability to bear some illness, [his property] will not be disturbed but passes to his heirs. 3. It has been agreed that manumissions granted by a debtor in order to defraud the imperial treasury are withdrawn; but, indeed, it is not forbidden that he buy a slave from someone else in order to manumit [him]; and, therefore, he can then grant [him] liberty. 4. It is agreed that documents or holographs, which form part of property denounced to the imperial treasury, as also records relating to the rights of private persons, are to be returned on request. 5. Neither documents nor records ought to be disclosed by anyone against [the interests of] the imperial treasury. 6. The imperial treasury itself, however, issues copies of its own records on condition that the person who has a right to take the copy does not make use of these records either against [the imperial treasury] itself or against the state; and as regards this he is required to give security that if he should use them contrary to the prohibition, he will lose his case. 7. Whenever anyone is in litigation with the imperial treasury, power [to use] records must be sought so that [the applicant] may properly make use of them, and they are to be certified in the hand of the records officer. If, however, they are disclosed in any other manner the person who thus discloses them loses his case. 8. Whenever the same action is brought again before the fiscal court, it shall be lawful to call for an official reading from the earlier records, the use of which had not [previously] been requested. 9. A man who, after being sued by the imperial treasury on behalf of another, discharges the debt, may with justice seek to make a claim on the property of the person on whose behalf he made the payment; and it is customary for him to receive official assistance in this. 10. It has been agreed that persons in debt to the imperial treasury should not be refused if they seek an adjournment in order to raise the money. The assessment of this matter is left to the discretion of the judge, provided that in the case of larger amounts, [the period] may be extended for not more than three months, but in the case of smaller for not more than two; [any] longer period of time, however, must be sought from the emperor. 11. If the property of the principal debtor has devolved upon the imperial treasury, the *fideiussores* are released, unless by chance he is insufficiently solvent, and they become accessory to the remainder of the sum that has not been fully paid. 12. If, when the property of a debtor has been sold off by the imperial treasury, a larger sum is obtained [than the amount of his debt], it is both lawful and right to seek its restoration. 13. A person leasing a farm which belongs to the imperial treasury cannot transfer anything from it, nor sell any cypress or olive timber without planting replacements, and [he cannot] cut down other fruit-bearing trees; and [if he does so] after an assessment has been made of this occurrence, he is liable to a fourfold penalty. 14. No farm and no taxes are to be let out to persons below the age of twenty-five in case they should make use of the benefit of their age in respect of them.

46 HERMOGENIAN, *Epitome of Law, book 6:* The right of succession is taken away from a person on the ground of unworthiness, if he, although having been instituted heir as a son, is declared, after the death of his alleged father, to have been suppositious. 1. A person who has knowingly received anything in order to defraud the imperial treasury is compelled to restore not only the thing in respect of which he made himself accomplice to the fraud but as much again. 2. Anything which has been acquired by a provincial governor or by a procurator or by anyone else in the province in which he holds office, even if through a man of straw, is forfeit, after the contract has been invalidated, and its value paid to the imperial treasury; and again, anyone who holds office in a province is forbidden to build a ship there. 3. The imperial treasury always has the right of pledge. 4. A person who challenges the imperial treasury over the rendering of an account must show what is owed to himself within two months. 5. It has frequently been laid down that debtors of the imperial treasury must have set off against their debt what the imperial

treasury owes [them], an exception being made for *tributa* and *stipendia*, as also for the value of anything bought by the imperial treasury, and anything owing from a case involving the corn supply. 6. A person subject to a charge can administer his own property, and his debtor may properly pay him in good faith. 7. [Fiscal] procurators are forbidden, without consulting the emperors, to put up for sale [slave] managers who are undertaking any employment relating to property which is being sold off, and if they should be sold, the sale will be of no effect. 8. If a slave of the emperor has entered on an inheritance at the order of a procurator, he acquires it at the wish of the emperor. 9. If several persons have [together] defrauded the imperial treasury, they are liable, not each for the entire sum as in an action for theft, but all together for a fourfold penalty, to the extent of each one's means. Indeed, those who are solvent are sued for those who are not.

47 PAUL, *Decrees, book 1:* A certain [woman called] Moschis, who owed money to the imperial treasury arising from the farming of a tax, had had heirs from whom, after they had entered on their inheritance, Faria Senilla and others had bought landed estates. When [the buyers] were sued over the arrears left by Moschis, they alleged both that Moschis's heirs were solvent and that many others had bought from the same estate; the emperor thought it right that the heirs ought first to be sued, and thereafter every person in possession for the balance; and he gave judgment accordingly. 1. Aemilius Ptolemaeus had taken the lease of an estate from the imperial treasury and had let it out bit by bit to a number of persons for a greater sum than he had himself undertaken; he was sued by the imperial procurators for the sum that he himself had received. This seemed unfair and unprofitable to the imperial treasury that it should in spite of this sue at its own risk those to whom he had granted leases; and so [the emperor] gave judgment that he should be sued [but] only in respect of that amount to which he had been liable as lessee.

48 PAUL, *Decrees, book 2:* Statius Florus, having written his will, had given a tacit *fideicommissum* to his heir, Pompeius, that he should give a farm and a certain amount of money to someone not [capable of] taking, and had on that account taken care that security be demanded of Pompeius that he would hand over that which he [Florus] had given as an advance legacy. Subsequently, the same Florus, having made a second will and instituted the same Pompeius and one Faustinus as his heirs, had given no advance legacies to Pompeius. The person [named in the earlier will] who had been unable to take had denounced himself. The emperors, having been consulted by the procurators, had written in a rescript that if it were not proved that the [testator's] intention had changed, the *fideicommissum* must hold good; and thus, Pompeius, on being condemned, asked that that burden should be one on the inheritance, because he had not received any advance legacies; nor could the testator be regarded as having maintained in part the intention in his first will, but [only] as a whole. [The emperor] gave judgment that the earlier will no longer stood; nor, if [the testator] had granted [something] in his first will, could it be sought from a later one unless the grant had been repeated. It was agreed that because [Pompeius] did not prove, on the single fact of his having given security, that the advance legacies had been granted to him, he alone must carry out the *fideicommissum*. 1. A mother who was instituted as heir [by her son] was asked [in the will] to restore the inheritance on her death to Cornelius Felix. When the woman, as the appointed heir, was condemned by the imperial treasury and all her property confiscated, Felix alleged that he had priority over the [fiscal] penalty (for this is laid down in the constitutions). But anyhow, the [operative] date of the *fideicommissum* had not yet arrived, because he himself might die first, or even the mother herself acquire other property, [so] his petition was turned down meantime.

49 PAUL, *Tacit Fideicommissa, sole book:* When someone to whom a tacit *fideicommissum* had been given had denounced himself as unable to take anything, the question was raised whether, under the benefit of the deified Trajan, he ought to

receive a one half share of three quarters [of the estate] or of the whole. There is extant on the subject a rescript of the Emperor Antoninus in these words: "The Emperor Antoninus to Julius Rufus. A person who undertook a tacit *fideicommissum* that he should hand over an inheritance to someone who is not [capable of] taking, if he handed it over after deducting one quarter, ought to keep nothing. But the quarter share which is assigned to the heir, let it be taken away from him and delivered to the imperial treasury." From this [we see that] someone who has denounced himself receives only a half share of three quarters [of the estate].

50 PAUL, *Decrees, book 3:* Valerius Patruinus, an imperial procurator, had assigned landed estates to Flavius Stalticius for a fixed price. Subsequently, other bidding took place and the same Stalticius, after his overbid was received, had been successful and had been admitted to vacant possession. A question was raised about the fruits which had been gathered meantime; Patruinus wished them to be the property of the imperial treasury. Clearly, if they had been gathered in the time between the first bidding and the subsequent overbid, they would belong to the seller (as is customarily said, when there was *in diem addictio* and then a better offer has been made), nor should we be swayed by the fact that [the overbidder] was the same man to whom the estates had originally been assigned. But when both assignations had been made within the period of the grape harvest, there was a departure from this general practice, and, therefore, it was agreed that the fruits belonged to the buyer. Papinian and Messius introduced a new opinion, that because the estates were under a tenant, it was unjust to deprive him of all the fruits, but that the tenant ought to gather them while the buyer should receive the rent for that year, so that the imperial treasury should not be liable to the tenant because he had not been permitted to enjoy [the fruits], just as if this had been agreed as part of the purchase. The emperor, however, gave judgment, following their opinion, that if, indeed, the lands were being cultivated by the owner, [Stalticius] should have all the fruits; if under a tenant, he [should] receive rent. On Tryphoninus raising the question what was his opinion about dried fruits which had previously been gathered on the estates, he gave the opinion that if the date for payment of rent had not yet arrived when the [lands] were assigned, the buyer would take them also.

15

PRISONERS OF WAR, *POSTLIMINIUM*, AND PERSONS RANSOMED FROM THE ENEMY

1 MARCELLUS, *Digest, book 22:* That for which the slave of a person who has been captured by the enemy subsequently stipulates, or any legacy which may come to his slave after he has passed into the hands of the enemy, shall be the property of his heirs because, if he had died in the course of his captivity, it would have been acquired by the heir.

2 MARCELLUS, *Digest, book 39: Postliminium* applies, according to the custom of war, to warships and freighters, not to fishing boats or to fast passenger vessels fitted out for the purpose of pleasure. 1. Again, a horse or mare broken to the bit is recovered by *postliminium;* for they can have run away without fault of the rider. 2. The same legal right does not apply to arms, insofar as they are not lost without shame; for it is forbidden to return arms by *postliminium,* since their loss is disgraceful,

3 POMPONIUS, *Quintus Mucius, book 37:* as also clothes.

4 MODESTINUS, *Rules, book 3:* It was agreed by the men of old that persons captured by, or surrendered to, the enemy should return according to the right of *postliminium.* Whether a person who, after being surrendered to the enemy, has returned and

not been accepted by ourselves, is a Roman citizen was dealt with variously as between Brutus and Scaevola; and it follows that he may not obtain citizenship.

5 POMPONIUS, *Quintus Mucius, book 37:* The right of *postliminium* applies both in war and in peace. 1. In war, when those who are our enemies have captured someone on our side and have taken him into their own lines; for if during the same war he returns he has *postliminium,* that is, all his rights are restored to him just as if he had not been captured by the enemy. Before he is taken into the enemy lines, he remains a citizen. He is regarded as having returned from the time when he passes into the hands of our allies or begins to be within our own lines. 2. *Postliminium* is also granted in peacetime; for if we have neither friendship nor *hospitium* with a particular people, nor a treaty made for the purpose of friendship, they are not precisely enemies, but that which passes from us into their hands becomes their property, and a freeman of ours who is captured by them becomes their slave, and similarly if anything of theirs passes into our hands. In this case also *postliminium* is therefore granted. 3. If, however, a prisoner of war is released by us and joins his own people, he is understood to have returned with *postliminium* if and only if he prefers to follow those [who are his own] rather than remain in our *civitas.* Accordingly, in the case of Atilius Regulus, whom the Carthaginians sent to Rome, the opinion was given that he had not returned with *postliminium* because he had sworn that he would return to Carthage and had not had the intention of remaining in Rome. And so in the case of a certain Menander, an interpreter, who was sent to his own people after he had been manumitted among ourselves, the law passed to cover him, that he should remain a Roman citizen, was not seen as necessary; for if his intention was to remain among his own people, he would cease to be a citizen, while if his intention were to return, he would remain a citizen; the law, therefore, would be entirely pointless.

6 POMPONIUS, *Readings, book 1:* A woman, condemned to the saltworks for a crime, was subsequently captured by petty brigands of a foreign nation and sold under the rules of trade. She was ransomed and reverted to her proper condition. The price paid was to be restored to Cocceius Firmus, a centurion, from the imperial treasury.

7 PROCULUS, *Letters, book 8:* I have no doubt that although free peoples and those bound to us by treaty are foreigners to us, there is no *postliminium* between us and them; for what need is there of *postliminium* between us and them, since they retain their freedom and rights over their own property in our country just as in their own, and the same applies to us in their country? 1. A free people is one which is not subject to the control of any other people; a *civitas foederata,* one which has either entered into friendship under an equal treaty or under a treaty [which] includes the provision that this people should with good will preserve the *majestas* of another people. It has to be added that that other people is to be understood to be superior, not that [the federated] people is not free; and insofar as we understand our client [states] to be free, even if they are not our equals in authority, dignity or power, so also those who are bound to preserve our *majestas* with good will are to be understood to be free. 2. But persons from *civitates foederatae* may be charged in our courts, and we inflict punishments on them [if] condemned.

8 PAUL, *Lex Julia et Papia, book 3:* A wife cannot be recovered by her husband, as a son can be by his father, by right of *postliminium,* but only when she wishes and so far as she has not married another after the fixed period [of five years]; but if she is unwilling, without there being a valid reason, she will be liable to the penalties for [unjustified] divorce.

9 ULPIAN, *Lex Julia et Papia, book 4:* A son born in enemy hands, if he returns with *postliminium,* possesses the legal rights of a son; for there is no doubt that he has *postliminium,* following the rescript of the Emperor Antoninus and his deified father to Ovinius Tertullus, governor of the province of Lower Mysia.

10 PAPINIAN, *Questions, book 29:* A father had appointed a substitute heir for his underage son who was instituted [heir]; he was captured by the enemy, and died there. On the subsequent death of the *impubes*, it appeared to some [authorities] that the [*heres*] *legitimus* was admitted [as heir] and that the *tabulae secundae* did not apply to the person of him who, had his father lived, would have become *sui juris*. However, the principle of the law gainsays this view; for if the father who failed to return is taken to have died at that time when he was captured, the substitution necessarily has its effect. 1. If, after the death of the father, an *impubes*, whom he has either instituted [heir] or disinherited, should be captured, it is self-evidently true to say that the *lex Cornelia*, which does not refer at all to *tabulae secundae*, applies only to a person who had *testamenti factio*. It is clear that an inheritance under the *jus civile* of a captive, even one *impubes*, is to be transmitted under the *lex Cornelia*, since it is true that an *impubes* indeed did not have *testamenti factio*; and, therefore, it is not inappropriate for the praetor to follow the father's intention as much as that of the law, and to grant to a *heres substitutus utiles actiones* for the inheritance.

11 PAPINIAN, *Questions, book 31:* However, if the son dies in the *civitas* before the death of his father in captivity, there is no action that can be taken as regards the *tabulae secundae*, either because the son-in-power is regarded as dying during his father's lifetime, if [the latter] has returned, or because, on the father's failure to return, the son is regarded as having been *sui juris* from the time his father came into the power of the enemy. 1. But if they should both be in enemy hands and the father dies first, the *lex Cornelia* applies to the *heres substitutus* just as if, after the father's decease in enemy hands, the son had later died in the *civitas*.

12 TRYPHONINUS, *Disputations, book 4:* In wartime *postliminium* exists, as also in peacetime for persons captured in war for whom no provision was made in the negotiations. Servius [Sulpicius Rufus] writes that this was agreed because the Romans wished their citizens' hope of returning to lie in their military courage rather than in peace. There are, however, those who have traveled in peacetime to foreign [peoples] and, on the sudden outbreak of war, are seized and become the slaves of those who have now become their enemies. The right of *postliminium* applies to them, in war as in peace, unless it had been provided in a treaty that the right of *postliminium* should not apply to them. 1. Should someone be captured by the enemy, those whom he had in his power are in an uncertain state, whether they become *sui juris* or are still to be reckoned as sons-in-power; for on his death in enemy hands, they will be considered as *patres familiarum* from the date of his capture or, should he return, as never having ceased to be in his power. Therefore, it has been debated whether, if, when the father has not returned, it should happen that others have been instituted heirs to all the estate ([the *sui*] being disinherited by the will) or to part of it, those things that [the *sui*] acquire meantime by stipulation, delivery, or legacy (for they cannot [do so] by inheritance) are part of the captive [father's] inheritance which falls under the *lex Cornelia*, or become their own property. The latter is true; and it is different in the case of those things which are acquired through slaves, and rightly so; for the one class were [part of his] property and continue to be so, while the others are understood to be *sui juris* from then on and for that reason to have acquired on their own behalf. 2. By no [imperial] constitution can questions of fact be undone. Therefore, usucapion is interrupted of property which was being usucapted by himself in person, by a possessor who is subsequently captured, because it is certain that he has ceased to have possession. However, Julian writes that it was believed in his time that usucapion of property which the [captive] was possessing and usucapting through persons legally subject to himself, or if in any way [this property] is included subsequently under the heading of *peculium*, continues to be fulfilled so long as those persons remain in possession. Marcellus writes that it makes no difference whether he possesses himself or through a person subject to him, but we should follow Julian's opinion. 3. A son who was in the power of someone [now] a captive can in the meantime marry a wife, although his father cannot consent to the marriage; for by the same token [he cannot] refuse consent. An acknowledged grandchild, therefore, will be in the power of the

returned captive, as his grandfather, and *suus heres* to him, even though it was to some degree against his will, because he did not give consent to the marriage. Nor is this surprising, since the situation and the exigency of that time brought it about, and the social utility of marriage required it. 4. But the wife of a captive, however much she may wish it and although she may live in his house, is not in the married state. 5. Codicils that a person writes during the time of his captivity are not in formal law taken to be confirmed in a will which he had made in the *civitas*. Nor is it possible for a *fideicommissum* to be sought from [the codicils], since they were not made by someone who had *testamenti factio*. But because the basic origin of them had been established in the *civitas* when the captive was settled there, that is, the confirmation of the codicils in the will, and the [testator] has returned and recovered his rights by *postliminium*, it is in accordance with humane principles that those codicils should be valid just as if meanwhile no period of captivity had intervened. 6. A person's other legal rights, after he has returned with *postliminium*, are considered just as if he had never been in enemy hands. 7. If anyone ransoms a captured slave from the enemy, he is thenceforth the property of the ransomer, even if [the latter] knows that he belonged to someone else; but on there being offered to him by the former master the price that he paid, the slave is to be regarded as having returned or been taken back by *postliminium*. 8. Again, if someone has redeemed a captive in ignorance, believing him to be the property of the seller, let us see whether he can be regarded as having usucapted him, if the former master did not have the opportunity to offer the price after the period fixed by law. As against this, the constitution which was passed concerning ransomed [property] makes him the slave of the person who ransomed him, and it is not possible for me to be understood as usucapting what is now my property. Again, since the constitution does not worsen but if anything improves the position of those who pay ransoms, it is unjust and contrary to the intention of the constitution for a buyer's oldest right, based on good faith, to be extinguished; and therefore, once the time has passed in which usucapion could have been [completed], had not the constitution made him [the ransomer's] own property, it will correctly be stated that under the constitution there is nothing left for the master. 9. But if [the ransomer] manumits him, does this only mean that he has ceased to be master, and does the slave whom he has abandoned return to the legal ownership of his previous master? Or does he make him a freeman, so that the [apparent] granting of freedom is not [just] a transfer of ownership? Certainly, someone manumitted while in enemy hands is freed; but if his former master had gained possession of him within our lines although [the slave] was not following our cause but had come all the while with the intention of returning to [the enemy], he would retain the slave by the right of *postliminium*. In the case of freemen, it was otherwise; for [a freeman] would not return with *postliminium* unless he had come [back] to his own people with the intention of following their fortunes and of leaving those from whom he had departed, because, as Sabinus writes, everyone has the unrestricted power of deciding on his own *civitas*, [but not on] the right of ownership. This does not, however, greatly burden our present consideration, since manumission [carried out] under enemy law could not prejudice a Roman citizen who is the owner of a slave; but the [slave] about whom we are inquiring had a Roman citizen as his master under our law as established by the constitution, and we are dealing with whether he can obtain freedom from him. For what if he never offered the price of him? What if he had no opportunity of suing him? Shall the slave be free, who can obtain freedom from his master by no merit of his own? That is unjust and contrary to the *favor libertatis* established by our ancestors. Certainly, under the old law if a third party had bought in good faith [a slave] from someone who had ransomed him in the knowledge that he belonged to another, [the buyer] could usucapt him and bring him to liberty, and in this way also the former master, who had been [his owner] before his captivity, would lose his rights. Why, therefore, does this person not have the right to manumit him? 10. If he was a *statuliber* before his capture by the enemy, then, on being ransomed, he will retain his status as long as the condition [of his freedom] is still pending. 11. What, then, if he had accepted his freedom on condition that he paid ten thousand? From where ought he to pay? Because even if it was allowed to the *statuliber* to pay out of his *peculium*, yet can it be said this [*peculium*,] which he has while in the possession of the man who ransomed him, is a substitute for that which he would have acquired while in enemy hands? At any rate, if it was acquired in connection with the affairs of [his ransomer] or through his own work he cannot pay from there; but he can pay out of a *peculium* originating from some other cause, and so we may charitably regard him as having complied with the condition [of his freedom]. 12. If a slave had been given as a pledge before his captivity, he falls back under the old obligation after his ransomer has been paid off, and if the creditor offers the ransomer the amount for which he was ransomed, [the creditor] has a double claim in respect both of the previous instance of debt and of the sum with which he freed him, as if that claim had been sanctioned by a particular constitution, as when a subsequent creditor gives satisfaction to a previous one for the purpose of confirming his pledge, except that in this instance the matter is reversed, and it is the subsequent [party], because he was responsible for the slave's being in our hands, who has to be paid off by the previous one, as if the latter were in the weaker position. 13. If he had been the slave of a number of people and the price is paid over to the man who ransomed him in the name of all of them, he will return to their common ownership; if [it was paid] in the name only of one or of some of them, not all, he will belong to him or to those who have paid, with the effect that they obtain their old rights over their own share [of the slave] and become successors to the ransomer as regards the share of the rest [who did not pay]. 14. If a captive was due his liberty under a *fideicommissum*, on being ransomed, he cannot yet seek it unless he has recompensed his ransomer. 15. If the enemy has captured a deported person from his island, if he should by some chance be ransomed and return, he will arrive at the same condition as he would have held had he not been captured, and will therefore be deported. 16. And if, in the case of a captive slave, there was some pre-existing reason which would prevent his freedom either temporarily or permanently, it will not be altered by his being ransomed from the enemy, as, for example, if it had been established that he had committed [an offense] against the *lex Fabia* [on kidnapping], or had been sold on condition that he should not be manumitted; in the meantime, however, the ransomer shall possess [him] without penalty on his own part. 17. Accordingly, someone captured from the mines who is ransomed shall be returned to his punishment, but, however, he shall not be punishable as a runaway from the mines, but his ransomer shall receive a reward from the imperial treasury. This was laid down by our emperor and by the deified Severus. 18. If a legacy is made to you of a child of Pamphila and you ransom the mother and she gives birth in your house, it does not appear that you possess this offspring with intent to profit, but [it is] for the office and discretion of the judge to estimate the [value of] the offspring at a fixed price, just as if the offspring had been sold at whatever price the mother was bought for. But if the child which she was carrying in her womb at the time she was captured by the enemy, who was born while still in enemy hands, is ransomed with his mother by the same person and for the one price, then, by offering as much of the price as was given in the one [payment] for both, an estimate is reached of the value of the offspring; and he is seen as having returned with *postliminium*. This is much more so if there are different buyers for both [mother and child], or for one of them. But if [someone] ransomed each [of them] at an individual price, what was paid to the enemy for each should be offered for each individual to the ransomer, so that [the two of them] can also return separately with *postliminium*.

13 PAUL, *Sabinus, book 2:* If I should have given myself to you for adrogation, it is agreed that after my emancipation, my son, on his return from the enemy, will be in the position of a grandson to you.

14 POMPONIUS, *Sabinus, book 3:* Since there are two types of *postliminium*, either that we should return to our own people or that we should receive back a certain thing, when a son returns, he ought to be an instance of both types of *postliminium*, in that his father is getting him back and he himself is getting his rights back. 1. A husband does not get his wife back by *postliminium* as a father does his son; it is only by consent that the marriage is renewed.

15 ULPIAN, *Sabinus, book 12:* If, when his father has been ransomed and has died before discharge of the debt, a son after his death should offer the amount of the ransom, it should be said that it is possible for him to be *suus heres* to [his father]; unless by chance someone should say with greater formal logic that [the father], in dying, had obtained *postliminium*, the legal right of pledge being as it were at an end, and that he had died without the obligation for the debt, so that he was able to have a *suus heres*. This will not be an unreasonable argument.

16 ULPIAN, *Sabinus, book 13:* A person who comes home from enemy hands is retrospectively regarded as having been in the *civitas.*

17 PAUL, *Sabinus, book 2:* Those who, after being defeated, have surrendered themselves along with their arms to the enemy do not enjoy *postliminium.*

18 ULPIAN, *Sabinus, book 35:* In every branch of the law, a person who fails to return from enemy hands is regarded as having died at the moment when he was captured.

19 PAUL, *Sabinus, book 16: Postliminium* is the right, established by customs and laws between ourselves and free peoples and kings, of recovering from a foreigner property which has been lost and restoring it to its former condition. For what we have lost in war, or even short of war, if we recover it again, we are said to recover by *postliminium.* And this was introduced by natural justice, so that a person wrongfully detained by foreigners might, when he had returned to his own country, recover his former rights. 1. A truce exists when, for a short and immediate period, it is agreed that [the two sides] shall not harass each other; at this time there is no *postliminium.* 2. Persons captured by pirates and brigands continue to be freemen. 3. A person is seen as having returned with *postliminium* when he enters our territories, just as he was lost when he went outside them. However, if he comes to an allied or friendly *civitas,* or to the court of an allied or friendly king, he is forthwith seen as having returned with *postliminium,* because it is there that he first, by the authority of the state, begins to be safe. 4. There is no *postliminium* for a deserter to the enemy; for the man who with evil counsel and a traitor's intention has left his *patria* is to be counted among [our] enemies. This though is the legal position in the case of a free deserter, whether a woman or a man. 5. If, however, a slave deserts to the enemy, then, because, on his accidental [re]capture, his master has *postliminium* over him, it is very correctly stated that there is *postliminium* even for him, namely that his master may recover his former right over him, lest the opposing legal right [of punishment] should be not so much injurious to the slave himself, who remains a slave in perpetuity, as it would represent a loss to his master. 6. If a *statuliber* deserter should return then, if the condition is satisfied after his return, he is made free. It is different should the condition have been fulfilled while he was with the enemy; for in that case it is not possible for him himself to return in order to be free, nor is there a right of *postliminium* over him for [his master's] heir, who cannot lay a complaint because he is not suffering any loss and the freedom [of the *statuliber*] would already be in effect, were it not prevented by the fact that he has become a deserter. 7. Again, a son-in-power who is a deserter cannot return with *postliminium,* not at least while his father is alive, because his father lost him in the same manner as did his country, and because military discipline was, for Roman parents, a more ancient tradition than love of children. 8. A deserter, however, is taken to be not only someone who goes over to the enemy in time of war but also someone who goes over after accepting a promise during a truce to [a people] with whom Rome has no friendship. 9. If he, who had bought [someone] from the enemy, assigns the right of pledge to another for a greater sum than he paid to ransom him, it is not that sum but the earlier one which the ransomed man must pay; and the buyer has an action on sale against him who sold. 10. *Postliminium* is for people whatever their sex or status; nor does it make a difference whether they are freemen or slaves. For those who return with *postliminium* are not only persons capable of fighting, but all who are of such a character that they can be of use, whether by giving advice or in other ways.

20 POMPONIUS, *Sabinus, book 36:* If a captive, who had been warned to return when there is peace, has remained with the enemy of his own free will, he does not thereafter have *postliminium.* 1. It is true that on the expulsion of the enemy from the lands which he has captured, their ownership returns to the previous owners, and they are neither confiscated nor fall by way of booty, whereas any field which may be captured from the enemy['s ownership] is confiscated. 2. Ransoming gives the opportunity of returning [home]; it does not affect the right of *postliminium.*

21 ULPIAN, *Opinions, book 5:* If anyone has with him a freeborn woman, ransomed from the enemy with the intention that he should get children by her, and subsequently

he manumits a son born to her, along with the mother, under the designation of his natural son, the ignorance of him as husband and father ought not to stand in the way of the true status of those whom he seemed to have manumitted; and it should be understood that the mother is released from the bond of pledge from the time when he had hoped to get children by her. Therefore, it is agreed that she, who returned with *postliminium*, free and freeborn, has produced a freeborn son. But if she was publicly recovered as booty by the valor of our soldiers, and the father did not pay a ransom for the mother to anybody, she is forthwith declared to have returned with *postliminium*, not with a master but with a husband. 1. In civil dissensions, although the state is often wounded by them, the contest is not fought for the destruction of the state; and those who go off to join one or other side are not counted as true enemies among whom the rights of captivity and *postliminium* apply. Accordingly, it has been agreed that it is quite pointless for persons captured, sold, and thereafter manumitted, to petition the emperor for the restoration of their freeborn status, since they had not lost it by any [true] captivity.

22 JULIAN, *Digest, book 62:* The property of persons who have fallen into the power of the enemy and there died, whether or not they have *testamenti factio*, belongs to those to whom it would belong if they had not fallen into the power of the enemy. And it is required by the *lex Cornelia* that there should be the same legal right and the same ground for action in all matters which there would have been if the persons, for whose inheritances and tutelages arrangements were made, had not fallen into the power of the enemy. 1. Therefore, it is apparent that all those same things which the person who has been captured by the enemy would have had, if he had returned with *postliminium*, belong to his heir. Furthermore, whatever the slaves of captured persons stipulate for or accept is understood to have been acquired for their masters, when they return with *postliminium*; for which reason [such things] must necessarily belong to those who enter upon an inheritance under the *lex Cornelia*. If, however, there should be no extant heir, under the *lex Cornelia* the property is confiscated. Again, legacies to [the captives'] slaves, whether with immediate effect or conditional, will belong to the heirs. Also if a slave should have been instituted heir by a third party, he can enter on the inheritance at the order of the captive's heir. 2. But if the son of the person who is in enemy hands accepts or stipulates for [anything], it is understood to have been acquired for himself if his father dies before returning with *postliminium*. Even if he should die while his father is still alive, it will belong to the father's heir. For the status of men whose fathers are in the power of the enemy is in suspense, and if the father should indeed return, [such a person] is reckoned as never having been *sui juris*, while if his father dies, he is reckoned as having been a *pater familias* as from the time his father fell into the power of the enemy. 2a. A *pater familias*, who had two sons-in-power and ten thousand in property, was captured by the enemy; one of the sons, having taken ten thousand, acquired another ten thousand. If the father had died in enemy hands, what should the sons have? The opinion was given that had the father returned, the ten thousand subsequently acquired would also have been his; but since he died in captivity, [the ten thousand] was not common property but belonged to the acquirer. The [original] twenty thousand, however, should be divided equally. 3. Property which slaves of captives possess under the heading of a *peculium* is in suspense; for if their masters return with *postliminium*, it is understood to become theirs as *peculium* again, while if the masters die there, it will belong to their heirs under the *lex Cornelia*. 4. If someone who has a pregnant wife falls into the power of the enemy and, after his son has been born and died, he dies there, his will is of no effect, because by such a chance happening the wills [even] of those who remained in the *civitas* are annulled.

23 JULIAN, *Digest, book 69:* If someone falls into the power of the enemy, leaving a pregnant wife behind, and his son born thereafter himself marries a wife and begets a son or daughter, and the grandfather then returns with *postliminium*, he will take all legal rights in the name of his grandchild, just as if he had been in the *civitas* when his son was born.

24 ULPIAN, *Institutes, book 1:* The enemy are those on whom the Roman people has publicly declared war, or who themselves [declare war] on the Roman people; others are termed robbers or bandits. Therefore, a person who is captured by brigands is not the brigands' slave, nor does he need *postliminium*; after capture by the enemy however as, say, by the Germans and the Parthians, he is the slave of the enemy and recovers his former status with *postliminium.*

25 MARCIAN, *Institutes, book 14:* The deified Severus and Antoninus wrote in a rescript that if a wife were captured by the enemy along with her husband and there gave birth by her husband, if they returned [together], they were parents and children in the eyes of the law, and their son was in his father's power, inasmuch as he had returned with the right of *postliminium*; but if [the child] were to return with his mother alone, he will be held a bastard, as if born without a husband.

26 FLORENTINUS, *Institutes, book 6:* It is of no concern in what manner a captive has returned, whether he was set free or whether he escaped from the power of the enemy by force or trickery, provided that he comes back with the intention of not returning thither; for it is not enough for a person to have returned home in body, if in spirit he is elsewhere. But those who are rescued on the defeat of the enemy are reckoned as having returned with *postliminium.*

27 JAVOLENUS, *From the Posthumous Works of Labeo, book 9:* Brigands had carried off your slave; subsequently, this slave came into the hands of the Germans; then, on the defeat of the Germans in battle, your slave had been sold. Labeo, Ofilius, and Trebatius say that he cannot be usucapted by the buyer, because the truth was that he was stolen; nor does the fact that he had been [a slave of] the enemy or had returned by *postliminium* prevent this.

28 LABEO, *Plausible Views, Epitomized by Paul, book 4:* If anything is captured in war and, having been lost, is recaptured in war, it is classed with booty and does not return by *postliminium.* PAUL: Not always. If [someone] captured in wartime flees home when peace has been made and then is [re]captured on the renewal of the war, he returns by *postliminium* to the person by whom he was captured in the earlier war, that is, if there is no agreement in the peace [treaty] that captives be returned.

29 LABEO, *Plausible Views, Epitomized by Paul, book 6:* If you have returned with *postliminium*, you have had no power to usucapt anything while you were in the power of the enemy. PAUL: Not always. If, while you were in that state, your slave possessed anything under the heading of *peculium*, you will be able to usucapt it at that time also since, even without our knowledge, we customarily usucapt such things. And it is in this way that the inheritance of a posthumous child who is not yet born or [an inheritance] not yet entered into is commonly increased through a slave of the inheritance.

30 LABEO, *Plausible Views, Epitomized by Paul, book 8:* If a thing of ours which the enemy captures is of such a kind that it can return by *postliminium*, then as soon as it has escaped from the enemy for the purpose of returning to us and has begun to be within the boundaries of our empire, it is to be reckoned as having returned by *postliminium.* PAUL: Not always. When the slave of a Roman citizen, after capture by the enemy, escapes from thence and is in the city of Rome, but in such a way that he is neither in the power of his master nor serving anyone else, it is to be reckoned that he has not yet returned by *postliminium.*

16

MILITARY LAW

1 ULPIAN, *Edict, book 6:* A soldier who is on leave is not seen as being absent on state business.

2 ARRIUS MENANDER, *Military Law, book 1:* Soldiers' crimes or offenses are either peculiar or common to other men; and accordingly, their prosecution is either peculiar or common. A peculiar military crime is one which a man commits in his capacity as a soldier. 1. It is reckoned a serious offense for a man, who may not lawfully do so, to enlist as a soldier; and [the seriousness] is increased, as with other crimes, by the status, the rank, and the type of service.

3 MODESTINUS, *Punishments, book 4:* The provincial governor, after giving a deserter a hearing, shall send him to [his] commanding officer with a written statement, except in the case where that deserter commits some more serious offense in the province in which he was found; for the deified Severus and Antoninus wrote in a rescript that he ought to be inflicted with punishment in the place where his misdeed was committed. 1. Soldiers' punishments are of such kinds as these: reprimand, money fine, imposition of duties, change of branch of the service, reduction in military rank, dishonorable discharge. For [soldiers] shall not be handed over to the mines or to the *opus metalli,* nor are they tortured. 2. A soldier absent without leave is one who, after absence for rather a long time, makes his own way back to camp. 3. A deserter is one who, after absence for a prolonged period, is brought back. 4. He who absents himself on reconnaissance in the face of the enemy, or who retreats from an entrenchment, should suffer capital punishment. 5. A man who abandons his post of duty is more than one absent without leave; therefore, he is corporally punished or reduced in rank according to the seriousness of his offense. 6. If anyone should abandon his guard duty over the governor or any superior officer, he shall suffer [the penalty for] the crime of desertion. 7. If anyone does not come back on the last day of his leave, he is to be punished, just as if he had gone absent without leave or had deserted, according to the length of time [he has been away]; [but this] after he has first been given the opportunity to show whether he has by ill-luck been delayed by various accidents on account of which he may appear to deserve pardon. 8. A man who has completed the term of his military service in desertion is deprived of his pension. 9. If a number of men together first desert and then return within a set period, they should be reduced in rank and posted to separate stations. New recruits, however, should be pardoned; but if they again commit this offense, they are visited with an appropriate punishment. 10. A man who has deserted to the enemy and has returned shall be tortured and condemned to the beasts or to the gallows, although soldiers suffer none of these [punishments]. 11. A man who intends to desert to the enemy and is caught suffers capital punishment. 12. However, if anyone is captured unexpectedly by the enemy while in the course of making a journey, then after the conduct of his previous [military] life has been examined he shall be granted pardon, and if he should return after the expiry of his term of service, he shall be restored to the status of a veteran and shall receive his pension. 13. A soldier who has lost or disposed of his weapons in wartime suffers capital punishment; by indulgence, he changes his branch of the service. 14. Anyone who has stolen another's weapons is to be reduced in rank. 15. In wartime anyone who has done something forbidden by his commanding officer or has not obeyed his orders suffers capital punishment, even if his action is successful. 16. However, a man who has fallen out of line is normally either beaten with rods or changes his branch of service according to the circumstances. 17. Also anyone who climbs over the ramparts or enters camp over the wall suffers capital punishment. 18. If, indeed, anyone has jumped over the *fossa,* he is discharged from the army. 19. The man who has incited severe unrest among the soldiers suffers capital punishment. 20. If the disorder stirred up was confined to a noisy argument or a trivial complaint, then he is reduced in rank. 21. And when many soldiers conspire together for some crime or if a [whole] legion defects, it is customary for them to be withdrawn from military service. 22. Those who have refused to protect their superior officer, or have deserted him, suffer capital punishment if he is killed.

4 ARRIUS MENANDER, *Military Law, book 1:* A man who is born with [only] one testicle or who has lost [one] can lawfully serve as a soldier in accordance with a rescript of the deified Trajan; for the generals Sulla and Cotta are recorded as having been in that condition by nature. 1. If a man condemned to the beasts escapes and enlists in the army, then, whenever he is detected, he is to suffer capital punishment; and the same [principle] is to be observed in the case of [such] a

man who permits himself to be enrolled. 2. A man deported to an island, who makes his escape and has enlisted in the army or, on being enrolled, has concealed the fact, should suffer capital punishment. 3. Temporary exile becomes relegation to an island for one who volunteers as a soldier [while under this penalty], while for a man called on to serve [while subject to exile] concealment [of his status brings] permanent exile. 4. If a person temporarily relegated has enlisted as a soldier on the completion of his period of banishment, the reason for his condemnation should be inquired into, so that if it involves permanent infamy, the same [principle] may be observed, [while] if it has been settled that for the future he can both return to the *ordo* and seek honors, he is not forbidden military service. 5. A person volunteering as a soldier who is guilty of a capital offense is, according to a rescript of the deified Trajan, to suffer capital punishment; nor is he to be sent back to the place where he was arraigned, but he is to be given a hearing insofar as the case is relevant to his military service. 6. If his case has been opened [in a civil court] or he is registered as "wanted," he is to be dismissed with ignominy and remitted to the [civilian] judge, and is not to be accepted thereafter as a volunteer soldier, even if he is acquitted. 7. Adulterers, or [men] found guilty in another criminal trial, are not to be accepted as soldiers. 8. Not everyone who is involved in a lawsuit, and accordingly joins the army, is ordered to be discharged, but [only] the man who has enlisted in the army with the intention that under the cloak of military service, he might make himself more expensive to his opponent. Pardon should not readily be given to those who have previously had the trouble of a lawsuit, but if it resulted in a settlement, pardon should be given. A person discharged on that account will not, of course, be infamous, nor is he, at the conclusion of the case, to be forbidden to enlist in the same branch of military service; as a general rule, should he drop the case or bring it to a settlement, he should be kept on [as a soldier]. 9. Our emperor wrote in a rescript that those who, after desertion, submitted their name for another branch of military service or allowed themselves to be levied, should be subject to military punishment. 10. It is, however, a more serious crime to evade the burden of military service than to seek it; for in olden times those who failed to answer the levy were reduced to slavery as betrayers of liberty. With the changed conditions of military service, however, there has been a departure from [such] capital punishment, since for the most part the numbers are made up with volunteer soldiers. 11. A man who withdraws his son from the army in time of war is to be punished with exile and [the loss of] part of his property; if in peacetime, it is ordered that he be beaten with rods, and if the youth is discovered or is produced by his father, [the youth] is to be handed over to an inferior branch of the service; for he who has allowed himself to be [thus] thrown off his course by another does not deserve pardon. 12. A command of the deified Trajan sentenced to deportation a person who had disabled his son to make him unfit for military service when the levy for war was announced. 13. The edicts of Germanicus Caesar counted a soldier who had been absent for a long time as a deserter, but it was subsequently laid down that if he had at any time had the intention of returning, he should be counted among those absent without leave. But whether [such a soldier] returns and gives himself up or whether he is arrested and handed over, he avoids the punishment for desertion; nor does it matter to whom he gives himself up or by whom he is arrested. 14. So the crime of absence without leave is treated more leniently, as is that of truancy among slaves, and that of desertion more seriously, as in the case of runaway [slaves]. 15. However, the reasons for absence without leave are always examined: why and where [the soldier] was, and what he was doing; and pardon is given for reasons of health, for the love of parents and relations, or if he was pursuing a runaway slave, or if there is some other reason of this kind. Also, allowance is made for a recruit still unaccustomed to discipline.

5 ARRIUS MENANDER, *Military Law, book 2:* Not all deserters are to be punished in the same way, but account is taken of their rank, their campaigns, their military grade, or where they are stationed, the duty that they have deserted, and their previous life; there is also the number, whether one person deserted alone, or with another, or with several others, or whether he added any other crime to that of desertion. Again, [account is taken of] the time for which he was in desertion, and of what was done subsequently. Again, if someone returns of his own free will, not under compulsion, his fate will not be the same. 1. A man who has deserted in peacetime, if he is a cavalryman, is to lose his rank, if an infantryman, changes his branch of the service. In wartime, there is capital punishment for the same offense. 2. A [soldier] who adds another crime to desertion is punished more se-

verely; and if he carries out a theft, it is to be reckoned as a second desertion, as [also] if he commits kidnapping or there is added an assault, or cattle-lifting, or something of the same kind. 3. If a deserter should be found in Rome he generally suffers capital punishment. If [he is] arrested somewhere else, he can be reinstated after the first desertion; for a further desertion he is to suffer capital punishment. 4. A person who has been in desertion, if he gives himself up, is, by favor of our emperor, deported to an island. 5. A [soldier] who has been captured and has failed to return when he had the power to do so is reckoned as a deserter to the enemy. It is also established that [a soldier] who is captured within our lines is in the same position; however, if someone is captured unexpectedly while making a journey or carrying a message he deserves pardon. 6. Hadrian wrote in a rescript that soldiers released by barbarians ought to be reinstated, if they should prove that they escaped after being captured, and that they had not deserted to the enemy. However, given that clear proof of this may not be possible, there must be an investigation on the basis of the evidence. If the man was previously rated a good soldier, this is a sound reason for believing his testimony; if he used to overstay his leave, or was negligent of his duties, or idle, or neglectful of his messmates, [his testimony] is not be believed. 7. If a [soldier] who was captured by the enemy comes back after a long time and it is established that he was captured and not a deserter to the enemy, he is to be reinstated as a veteran and takes his rewards and his pension. 8. The deified Hadrian wrote in a rescript that [a soldier], who deserted to the enemy and later apprehended a large number of brigands and identified [other] deserters to the enemy, could be spared; but that nothing should be guaranteed to someone who [only] promises to do such things.

6 ARRIUS MENANDER, *Military Law, book 3:* Every disorder committed to the prejudice of the common discipline is a military offense, as, for example, the crime of idleness, or of willful disobedience, or of sloth. 1. A man who has laid hands on a superior officer should suffer capital punishment. The crime of insolence is made more serious according to the rank of the superior officer. 2. All willful disobedience of a soldier toward the general or the provincial governor should receive capital punishment. 3. Whoever was first to flee from the line of battle must suffer capital punishment with [his fellow] soldiers looking on, by way of example. 4. Spies who have passed secrets to the enemy are traitors and pay the penalty with their heads. 5. Also a common soldier who feigns bodily weakness out of fear of the enemy is in the same case as he. 6. If anyone has wounded a fellow soldier, then if it was with a stone, he is dismissed the service; if with a sword, he commits a capital offense. 7. If a man has wounded himself or has attempted suicide in some other way, the Emperor Hadrian wrote in a rescript that the circumstances of the matter should be established, so that, if he had preferred to die out of inability to bear pain, or *taedium vitae,* or disease, or madness, or shame, the death penalty should not be inflicted on him, but he should receive a dishonorable discharge; but if he could put forward no such excuse he should suffer capital punishment. The capital penalty should be remitted to those whose misconduct was due to drink or jest, and change of service imposed. 8. A [soldier] who did not protect his superior officer, when he could, is to be reckoned in the same case as the perpetrator; if he could not have put up a defense, he should be spared. 9. Again, it has been accepted that the death penalty should be applied to those who have deserted their prefect or centurion when he was beset by brigands.

7 TARRUNTENUS PATERNUS, *Military Law, book 2:* Traitors and deserters to the enemy generally suffer capital punishment, and after being discharged are tortured; for they are counted as public enemies, not as soldiers.

8 ULPIAN, *Disputations, book 8:* Persons whose status is in dispute, even if they are in actual fact freemen, ought not, for the time being, to enroll for military service, especially if legal proceedings have been instituted, whether an action is being raised to reduce them from liberty to slavery, or the reverse. Nor should persons who, though of free birth, are serving as slaves in good faith [enlist], nor those who have been ransomed from the enemy until they have discharged their debt.

9 MARCIAN, *Institutes, book 3:* Soldiers are forbidden to buy estates in the provinces in which they are serving, unless the imperial treasury has sold off their ancestral property; for Severus and Antoninus have made an exception in favor of such cases. But when they have completed their full service, they are allowed to buy. An estate acquired unlawfully is claimed by the imperial treasury, if an information is laid. However, if before the case has

been denounced, his service has been completed or his discharge takes place, there is no scope for laying an information. 1. If soldiers are made heirs, they are not prohibited from possessing estates there.

10 PAUL, *Rules, sole book:* [A soldier] who deserts his guard duty over the *palatium* suffers capital punishment. 1. [A soldier] restored to the service following desertion can only receive his pay and gratuities for the intervening time if the liberality of the emperor grants him this as a special favor.

11 MARCIAN, *Rules, book 2:* Slaves are forbidden all military service; otherwise they suffer capital punishment.

12 MACER, *Military Law, book 1:* The duty of the commander of an army consists not only in leading but also in watching over discipline. 1. Paternus has also written that [a general] who is mindful that he commands armed troops ought to grant leave very sparingly, ought not to permit a stallion belonging to the army to be taken outside the province, nor dispatch a soldier on his own private business or out fishing or hunting. For in the *disciplina Augusti* provision is made in these words: "Even though I know that it is not inappropriate for soldiers to be employed on jobs as craftsmen, I nonetheless fear that if I should permit any such thing to be done for my convenience or yours, limits tolerable to me would not be imposed on this practice." 2. The duty of the tribunes, or of those commanding the army, is to keep the soldiers in camp, to lead them out on exercise, to keep the keys of the gates, to make the rounds of the sentries from time to time, to take part in foraging for their fellow soldiers, to examine the grain [ration], to chastise fraud by those measuring [it out], to punish offenses within the limits of their authority, to be present frequently at headquarters, to hear the complaints of their fellow soldiers, to inspect the sick.

13 MACER, *Military Law, book 2:* Soldiers are forbidden to buy land in the province where they carry out military duties, so that, as it were, they may not be distracted from their military service by an interest in farming; therefore, they are not forbidden to buy a house. Again, they can buy estates in another province. But it is not lawful for them to buy land, even in the name of another person, in a province to which they have come for the purposes of war; otherwise, it will be claimed by the imperial treasury. 1. However, a man who has bought land contrary to [this article of] discipline, if he has received his discharge without any question having been raised about the matter, is not allowed [thereafter] to be disturbed. 2. It is agreed that the benefit of this regulation does not apply to those who have been discharged with ignominy, because it is understood to be a concession to veterans by way of reward; and accordingly, it can be said to apply to a man who has been discharged on grounds of health, since he also is granted a reward. 3. The general circumstances of discharge are three: with honor, on grounds of health, and with ignominy. Honorable [discharge] is that which is granted when the term of military service is completed; that on grounds of health, when someone is declared insufficiently suitable for military service because of a defect of mind or body; circumstances of ignominy are when someone is released from his military oath on account of a crime. A man who has been discharged with ignominy is not able to live in Rome or to attend the imperial court. Even if [soldiers] are discharged without reference to ignominy, they are nonetheless understood to have been discharged with ignominy. 4. An insubordinate soldier is to be disciplined not only by his tribune or centurion but also by his commanding officer. The men of old branded with infamy the man who resists a centurion who is seeking to chastise him; if he has seized the rod of office, he changes his branch of the service; if he has deliberately broken it or laid hand on the centurion, he suffers capital punishment. 5. Menander has written that the escape of a man who gets away while under guard or in prison is not to be reckoned as classing him as a deserter, because he is a fugitive from custody not a deserter from military service. Paul, however, has written that the man who breaks out of prison and makes his escape, even if he has not previously deserted, should suffer capital punishment. 6. The deified Pius ordered a deserter, who had been given up by his father, to be transferred to an inferior branch of the service so that, he said, the father should not be seen as having delivered his son to his death. Again, the deified Severus and Antoninus ordered a man who gave himself up after five years' desertion to be deported. Menander has written that we should follow this example in other cases as well.

14 PAUL, *Military Punishments, sole book:* A man who has overstayed his leave is to be classed as either absent without leave or a deserter. Account, however, is taken of how many days late he was in returning, as also of the duration of his voyage or journey. If he

should prove that he was held up by sickness, or detained by brigands, or that he suffered delay from some similar accident, while at the same time proving that he did not set out so late from the place [where he was] that he could not arrive within the limits of his leave, he should be reinstated. 1. It is a serious crime to have disposed of one's weapons, and the offense is equated to desertion, certainly if [a soldier] has disposed of them all; as also a part of them, but a distinction is made. For if he [a soldier] has disposed of his shin-guard or shoulder-armor he ought to be punished with a flogging, but if of his cuirass, his shield, his helmet, or his sword he is akin to a deserter. Pardon will more readily be granted to a recruit for this crime, while generally speaking the blame is laid against the armorer if he has handed over arms to a soldier at an improper time.

15 PAPINIAN, *Replies, book 19:* [A soldier] after being made infamous for desertion and reinstated forfeits any payments for the time that he was in desertion. However, if there is an excuse and it seems that he was not a deserter, all his pay, without limitation of time, is returned.

16 PAUL, *Views, book 5:* A man, who enrolled in the army out of fear of a crime with which he had already been charged, is immediately to be released from his military oath. 1. A soldier who disturbs the peace suffers capital punishment.

17

PECULIUM CASTRENSE

1 ULPIAN, *Edict, book 14:* If the *peculium* of a son-in-power who was a soldier has remained with his father on the son's dying intestate, the father does not become his heir, but, however, he will become heir to any persons to whom his son was heir.

2 ULPIAN, *Edict, book 67:* Should a son-in-power who is a soldier die, then, if he was intestate, his property passes to his father, not as an inheritance but as a *peculium*; if, however, he had made a will, his *peculium castrense* is here treated as an inheritance.

3 ULPIAN, *Lex Julia et Papia, book 8:* If a woman leaves money to her husband's son, who is a soldier, to buy things for military life or perhaps for active service, these purchases at any rate come to be included in his *peculium castrense.*

4 TERTULLIAN, *Peculium Castrense, sole book:* A soldier ought to have exclusive rights in those things which he took with him into the army with his father's permission. 1. A son always has a right to bring an action and a claim over his military property, even against his father's wishes. 2. If a *pater familias* offers himself for adrogation, either during his military service or after his discharge, we shall have to see whether he also is to be understood as being permitted the administration of those things which he acquires on service before his adrogation; although the imperial constitutions speak [only] of those persons who are sons-in-power from the beginning of their service, this must be allowed.

5 ULPIAN, *Sabinus, book 6:* A soldier, who is a son-in-power, and who has been instituted heir by a fellow soldier or by someone whom he has come to know through his military service, may properly enter the inheritance at his own discretion, even without his father's command.

6 ULPIAN, *Sabinus, book 32:* If a wife gives [her husband, who is] a soldier and a son-in-power, a slave for the purpose of manumission, let us see whether the husband makes him his own freedman, since he could have both slaves and freedmen in his *peculium.* The better view is that this [freedman] is not included in his *peculium castrense*, because the wife was not known to [her husband] as a result of his military service. Clearly, should you put to me the case that the wife gave slaves to her husband as he was leaving for camp in order that he manumit them and have freedmen fit for military service, he can be said to grant them their freedom by manumission of his own free will without the permission of his father.

7 ULPIAN, *Edict, book 33:* If a husband has a *peculium castrense*, he will be condemned to pay insofar as he is able, because the better opinion is that he is obliged to make satisfaction from his *peculium*, even to creditors who are not connected with his military service.

8 ULPIAN, *Edict, book 45:* If it should happen that a wife or a blood relation or some other person not known to him through his military service gives anything or leaves a legacy to a son-in-power and states specifically that he is to have it as part of his *peculium castrense*,

can it be included in the *peculium castrense*? I think not; for we have regard, not to some person's pretence but to the truth, whether [or not] the acquaintanceship and affection did truly arise from his military service.

9 ULPIAN, *Disputations, book 4:* The case was put of a soldier, who was a son-in-power, who, having made his will, appointed a *heres extraneus* and then died during his father's lifetime. The father, while the instituted heir was still considering, himself died, and then the instituted heir refused the inheritance. To whom would the *peculium castrense* belong? What I said was that the *peculium castrense* of a son-in-power, if, indeed, he has died leaving a will, passes as an inheritance to the appointed heir, whether he appointed a *heres extraneus* or his father. However, when the son makes no declaration at all about his *peculium*, the assumption is not that it has now fallen to the father, but that it did not pass from him [in the first place]. In general, if a father writes in [his will] freedom for a slave who accompanies his son during his military service, and the son then dies in his father's lifetime, there is no obstacle to that freedom although, if the son survives the father, there would be an obstacle. From this, Marcellus thinks that it is possible to make a slave, belonging to a son's *peculium*, *heres necessarius* to the father, if the father survives the son. I gave the same reply in the case where the father leaves as a legacy something belonging to his son's *peculium*; for in the same circumstances in which we have said that the freedom is valid, the legacy also will either be due or will be barred. After these preliminary remarks in the case put forward, I said that since the heir did not enter upon the inheritance, the *peculium* reverted to [being] the property of the father; and from this it can also be stated that the father's property has been augmented by this refusal. Nor is it unheard of for someone to seem to have had a successor as a result of a later event. For if the son of a man captured by the enemy dies while his father is alive in captivity, then, should the father return, [the son] would possess the *peculium* as being a son-in-power; if, though, the father dies in that same place, the son will, as a *pater familias*, have a successor according to the civil law; and his successor is regarded as having possessed retrospectively those things as well which that son acquired meantime, and they will not be seen as having been acquired for the father's heir, but for the son himself.

10 POMPONIUS, *Rules from Marcellus's Notes, sole book:* It is agreed that nothing is owed to fathers from the military property of their sons.

11 MACER, *Military Law, book 2:* The *peculium castrense* is that which is given by parents or blood relations to a man engaged in military service, or that which a son-in-power has himself acquired in the army, and which he would not have acquired had he not served. For what was acquired outside military service is not a man's *peculium castrense.*

12 PAPINIAN, *Questions, book 14:* A father who gives his son, who is a soldier, in adoption cannot take away from him the *peculium* which the son has once held by right of military service. Nor, on this reasoning, does he by emancipating the son take away from him the *peculium* which he could not take away from [a son who] remained in the family.

13 PAPINIAN, *Questions, book 16:* The deified Hadrian wrote in a rescript of a man whom his wife had instituted heir while he was a son-in-power and in the army, that he was the heir and that slaves of the inheritance manumitted by him became his own freedmen.

14 PAPINIAN, *Questions, book 27:* If a son-in-power who is a soldier dies as a prisoner in enemy hands, the *lex Cornelia* will come to the aid of his appointed heirs; if they should withdraw, the father will have the *peculium* by virtue of his original right. 1. It appears to be a very similar instance when the appointed heirs are still deliberating, so that whatever meantime a slave has stipulated for or has had delivered to him by a third party, so far as it relates to the father's person, seems to be of no validity if it happens that the *peculium* remains with the father, because he was not at that time the slave of the father. But as regards the appointed heirs, the delivery, as also the stipulation, is understood to have been in suspense; for the effect is that once the inheritance has been entered, [the slave] is considered to have belonged [from the beginning] to the inheritance. However, respect for fatherhood moves us to the extent that in that class of case where the *peculium* remains with the father by his original right, he also acquires through the slave [a right] in the stipulation or in the thing delivered. 2. The legacy which was left to that slave, although, because of uncertainty, it was not then acquired by anyone, will, once the will has been discarded, then for the first time be acquired for the father through the slave although, had it been acquired for the *peculium* on the model of an inheritance, the right of the father would nowadays not be considered.

15 PAPINIAN, *Questions, book 35:* That which a father gives to his son, who is a soldier, on his return [from the army] he does not make part of the *peculium castrense* but of his other *peculium,* just as if the son had never served in the army. 1. If the son stipulates for [something] and [the father] promises [it], the stipulation will be valid if it is on account of the *peculium castrense;* but if it is on any other account, it will not be valid. 2. If the father stipulates for [something] from his son, the same distinction will be preserved. 3. If a slave who is part of the son's *peculium* should stipulate for [something] from a third party or receive something by delivery, the thing will belong to the son without defining the title; for as the son does not shoulder the dual duty of father and son-in-power, so the slave, who is part of the *peculium castrense* and not, so long as the son lives, subject by any rule to the father, can straightforwardly acquire something for the father by stipulation or by acceptance. This reasoning persuades us that if the slave who belongs to the son stipulates for [something] from the father on any grounds or accepts something as delivered, the thing and the stipulation are thus acquired for the son, just as if it had been an outsider who had made the promise, because the legal personality of the one who stipulates and who accepts is such that, without distinction of title, what is done through him looks to the benefit of the son. 4. If the father loses the usufruct in a slave who was owned by his son in his *peculium castrense* the son will have the full ownership.

16 PAPINIAN, *Replies, book 19:* I gave the opinion that a dowry given or promised to a son-in-power is not within his *peculium castrense.* This will not be seen as contrary to the fact that in the time of the deified Hadrian, it was agreed that a son-in-power, who was a soldier, had been heir to his wife and had possessed the inheritance for his *peculium castrense.* For an inheritance is obtained by a right other than from one's parents, but a dowry, being [legally] united to a marriage, is given for the burdens of the marriage and for its children, who are in the power of their grandfather. 1. I gave the opinion that an inheritance which one first cousin on the father's side, who was serving in another province, left to another such cousin with whom he had never served, did not appear to have been obtained for the *peculium castrense;* for it was the consideration of blood, not reasons of military service, which had earned the right to take the inheritance.

17 PAPINIAN, *Definitions, book 2:* A father who is going to keep the *peculium castrense* of his intestate son is compelled by praetorian law to pay the debts within the limits of [the *peculium*] and within the *annus utilis.* The same [father], if he is the heir appointed in a will, will be liable in perpetuity as heir to actions under the *jus civile.* 1. A father, instituted as heir by his son, who is a soldier or who has served as a soldier, has abandoned the claim of the will and possesses the *peculium castrense;* he will be liable in perpetuity, on the model of an heir under the *jus civile,* to pay legacies up to the limit of the *peculium.* But if a son has died a year [or more] after leaving the army, having made a will under the *jus commune,* then, out of regard for the [*lex*] *Falcidia,* one quarter will be retained. But if the father has abandoned the claim of the will, when the *peculium* was not [sufficient] to pay off the creditors, he will not be regarded as having acted in any way fraudulently, although he may encounter a saving of time.

18 MAECIAN, *Fideicommissa, book 1:* A slave who is part of a *peculium castrense* can be instituted heir by the father, and he makes the son *heres necessarius* to the father. 1. In general, those acts of a father are barred which produce the immediate alienation of any right arising from the *peculium castrense;* those acts, however, which do not generally have an immediate effect but do so subsequently, will be given consideration at the time at which they customarily take effect, so that if the son who is being deprived is [still alive], the act is invalid; if, however, he has died previously, the father's act is not barred. 2. Therefore, we shall deny that a father, in raising the action for dividing common property while the son is alive, may alienate property, for example, dotal land. Again, if a partner should of his own accord raise an action against him, whatever action is taken will not be valid, just as if he were raising an action against someone excluded from the administration of the property. 3. The father [of a soldier] can free slaves of that *peculium* from a usufruct, as also landed estates either from a usufruct or from other servitudes; and also he can acquire servitudes for [their benefit]. For it is true also that a person who is excluded from the [administration of his] property can achieve [these things]. But the father cannot impose a usufruct or a servitude on slaves of that *peculium* nor on its landed estates. 4. If at any time the son shall possess in good faith another party's property as part of that *peculium,* ought his father to be liable to an action *in rem* or for production, as [he would] with his other sons? The truer view is that since this *peculium* is distinct from the father's property, the

requirement of making a defense should not be imposed on the father. 5. And the father should not be compelled to defend an action on the *peculium* on account of a debt which the son is said to have incurred on the head of the *peculium* which he has acquired in the army. But if [the father] should submit to proceedings of his own free will, he must defend his son like any other defender by giving personal security for the whole sum, not [merely] within the limits of the *peculium*. Moreover, he can bring actions in the name of that son only if he gives security that [the son] will give ratification.

19 TRYPHONINUS, *Disputations, book 18:* Our colleague Scaevola used to have doubts about an inheritance given by someone who is both an agnate and a fellow soldier, because on the one hand he could have given it before [their joint service] as an acquaintance and a friend, or [on the other] he could have refrained from giving had not their common service increased his affection. It seems to us that if the will was made before their common service, the inheritance does not form part of the *peculium castrense*; if afterward, the reverse. 1. But if a slave of the *peculium castrense* is appointed as heir by anyone, then at the command of the soldier he shall be required to enter upon the inheritance, and it will become part of the property in the *peculium castrense*. 2. A son-in-power, having become a civilian, made a will disposing of his *peculium castrense* and died in ignorance of the fact that he had been *suus heres* to his father. He cannot be seen as having died testate as regards his military property and intestate as regards his paternal property, although there has even now been a rescript to that effect in the case of a [serving] soldier, because a soldier had been able from earliest times to die partly testate and partly intestate; but this man does not have the right to make a will other than with proper legal usage. Of necessity, therefore, the appointed heir to the *peculium castrense* will take the entire property, just as if a very poor man had died after making his will, in ignorance of the fact that he had been made rich by the agency of his slaves carrying on business in another place. 3. A father ordered in his will that a slave who was part of his son's *peculium castrense* should be free; on his son-in-power dying intestate, followed shortly by the father, is the slave's freedom competent? For the objection was that ownership [of the slave] as a whole could not belong to two persons [at once]. Hadrian, indeed, laid down that a son could manumit a slave who is part of such a *peculium*; and if the same slave had received his freedom both in the father's will and in that of the son, and both alike had died, there should be no doubt that he was free under the son's will. However, in the above, is it really possible that these things can be said about the freedom granted by the father? To the extent that the son uses the right granted him [by law] over his *peculium castrense*, to that extent his father's right ceases to have effect; but if the son dies intestate, his father, in imitation of a kind of *postliminium*, owns the *peculium* by his former right, and he is regarded as having had retrospective ownership over the property. 4. However, if by chance he laid the staff [of freedom] on the slave as heir [to his son] in the son's lifetime, it may not be said that the [slave] was made free by that manumission on the death of the son intestate. 5. But what if the son makes a will and his inheritance is not entered upon? It is not so easy [as in the previous instance] to say that the ownership of the property in the *peculium* is continued for the father after the son's death when meantime, while the instituted heirs are considering, [the son] has produced the semblance of a succession. Otherwise, if the inheritance of the son were entered upon by the instituted [heir], it will be said that the property has passed to him from the father, which is absurd. What if in the meantime, in this instance as in the others, we so view the ownership that we can regard it as either having belonged retrospectively to the father or not as having so belonged, according to what happened subsequently? On this principle, [however,] if, while the heirs are considering [whether to accept], time begins to run for the granting of a legacy to the slave who was part of that *peculium* under a will from which the father had been unable to take anything, it will be difficult to explain whether [the legacy] belongs to [the father] himself, [or not,] since it would assuredly belong to the son's heir. Consideration of the slave's freedom, however, is easier in that instance where the son is assumed to have died intestate. Surely, there is therefore no ground for the opinion that that liberty, granted [by the father] at the time when the [slave] was not in the father's ownership, is valid? However, we do not, in either event, refuse a judgment to the opposite effect, that is, favorable [to freedom].

20 PAUL, *Regula Catoniana, sole book:* But if you suppose that a son has made a will and has

instituted his father heir, although, indeed, the father had in his will granted freedom to his son's slave, who began to belong to him under his son's will, we must see whether [this slave's position] can be said to be compared with [that of a slave] who was the property of another at the time of his manumission and was then subsequently acquired. The favorable interpretation is to allow the freedom left [him] by the father; and that he is seen as having been the father's property from the beginning is shown by what happened subsequently.

18

VETERANS

1 ARRIUS MENANDER, *Military Law, book 3:* The privilege of veterans has among other things the prerogative that, even in criminal offenses, they are distinguished from others in their punishments. Therefore, a veteran is not thrown to the beasts nor beaten with rods.

2 ULPIAN, *Opinions, book 3:* The exemption [from public burdens] granted to those who have been honorably discharged from their military oath holds good even in those *civitates* in which they live; nor is that [exemption] undermined if one of them undertakes an office or a public duty of his own free will. 1. All persons are liable to pay [land] taxes and to support the religious burdens of their patrimonial estates.

3 MARCIAN, *Rules, book 2:* Veterans and their children have the same honorable status as decurions; accordingly, they shall not be condemned to the mines, nor to forced labor, or to the beasts, and they are not beaten with rods.

4 ULPIAN, *Duties of Proconsul, book 4:* A rescript sent to the veteran Julius Sossianus stated that veterans are not exempt from the duty of paving the road. For it is clear that veterans are not excused from contributions which arise from their possessions. 1. It was also stated in a rescript to the veterans Aelius Firmus and Antoninus Clarus that their ships could be requisitioned.

5 PAUL, *Judicial Examinations, sole book:* The deified Great Antoninus and his father wrote in a rescript that veterans are excused from ship-building. 1. They also have exemption from the collection of [personal] taxes, that is, they may not be made collectors of taxes. 2. But veterans who have allowed themselves to be appointed to the *ordo* [of decurions] are compelled to discharge the duties.

BOOK FIFTY

1

MUNICIPES AND FOREIGN RESIDENTS

1 ULPIAN, *Edict, book 2:* Either birth or manumission or adoption makes a man a *municeps*. 1. And, indeed, properly speaking those are called *municipes* who share in *munera*, who have been admitted to *civitas* in order to perform *munera* with us; but now we loosely call *municipes* the members of any particular community, as for instance, Campani or Puteolani. 2. So anyone who is born from two parents who are Campani is a Campanus. But if he is born from a father who is a Campanus and a mother who is a Puteolana, he is still a *municeps* Campanus, unless it happens that by some special dispensation the place of origin of the mother is taken into account; for then he will be a *municeps* of the place of origin of the mother. Thus, for instance, it has been granted to the Ilienses that anyone who is born from a mother who is an Iliensis is one of their *municipes*. This dispensation has also been granted to Delphi and also still exists there. Celsus also reports that the people of Pontus, by a grant of Pompeius Magnus, can regard anyone who is born from a mother from Pontus as being from Pontus. Some people hold that this grant only relates to children born out of wedlock; Celsus, however, does not agree with this view. For it would not have been necessary to observe that a child born out of wedlock should have the status of the mother; for what other provenance can such a person have? But the grant relates to those who are born from parents of different communities.

2 ULPIAN, *Disputations, book 1:* Whenever a son-in-power is made a decurion at the wish of the father, the father is subject to all the *munera* which are imposed on the son as decurion, as verbal guarantor for the son. The father is regarded as having agreed to the decurionate of the son if he was present and did not oppose the nomination. Thereafter whatever the son does in the public sphere, the father will be on call as verbal guarantor. 1. We must treat as done in the public sphere handling public money or decreeing its expenditure. 2. And even if he appoints curators of public works or anything else, the father will be liable. 3. And even if he nominates a successor for himself, he makes his father liable. 4. And even if he contracts out the collection of the public revenues, the father will be liable. 5. But if the son fails to assign tutors or chooses unsuitable ones, or fails to make adequate inquiry or accepts someone unsuitable, there is no doubt that he himself is liable; the father, on the other hand, is indeed only liable if verbal guarantors are also normally liable in this context. But they are not normally liable, because verbal guarantors undertake that public property will suffer no damage and it is of no relevance to public property whether tutors are assigned to *pupilli*, at any rate as far as financial matters are concerned (this is what is taught and it is the subject of rescripts). 6. Anyone who is absent longer than his leave of absence or than the terms established for leave of absence may be summoned to undertake *munera*.

3 ULPIAN, *Sabinus, book 25:* It is thought right for sons-in-power also to be able to have a domicile.

4 ULPIAN, *Edict, book 39:* Not indeed wherever his father has it, but wherever he himself fixes his domicile.

5 PAUL, *Edict, book 45:* Labeo holds that anyone who engages in business equally in a number of different places does not have a domicile anywhere; he admits, however, that some people say that such a person is an *incola* or has a domicile in a number of different places, which is closer to the truth.

6 ULPIAN, *Opinions, book 2:* The assumption of a false origin does not alter the truth of a real one; for a true origin is not erased or lost by the error or the falsehood of someone who says that he comes from somewhere not in fact his place of origin. The truth cannot be changed by someone denying his *patria*,

which is his place of origin, or by someone lying about a *patria* which is not his. 1. The son adopts the *civitas*, which follows from the real origin of the father, not his domicile. It was thought right by earlier jurisprudents for someone to be able to have a domicile in two places, if he so established himself in both places as not to seem of less fixed abode in either place. 2. Freedmen adopt the origin or the domicile of their patrons, likewise their offspring.

7 ULPIAN, *Duties of Proconsul, book 5:* If anyone is manumitted by several people, he adopts the origin of all his patrons.

8 MARCIAN, *Criminal Proceedings, book 1:* Antoninus and Verus issued a rescript to the effect that decurions were not to be forced to provide corn to their fellow citizens at less than the market price; this is also laid down in other imperial *constitutiones*.

9 NERATIUS, *Parchments, book 3:* The prime origin of someone who has no legitimate father is derived from the mother and must be regarded as effective from the day on which she bore him.

10 MARCIAN, *Informers, sole book:* No community has the same right as the imperial treasury over the goods of a debtor, unless this has been explicitly granted by the emperor.

11 PAPINIAN, *Questions, book 2:* The Emperor Antoninus issued a rescript to Lentulus Verus to the effect that the office of a magistrate was not in any way divided and that their liability was a joint one. This is to be understood in the sense that liability is indeed only imposed on a colleague if the business in hand cannot be completed by the man who undertakes it or by those who are his sureties and he cannot pay even after his term of office is over; otherwise, if the person or *cautio* is satisfactory or he can pay at whatever time may be agreed, the administrator responsible is the only person liable. 1. Now if by chance someone who nominated a magistrate at his own risk is solvent, should an action be granted first against him, as if against a verbal guarantor, or, on the other hand, only if the business in hand cannot be completed by a colleague? It was thought right on this analogy of a verbal guarantor that someone who nominated a magistrate should be sued first, since a colleague is involved only because of negligence and fraud, whereas someone who nominated a magistrate is involved by way of a guarantee.

12 PAPINIAN, *Replies, book 1:* And it is not expedient for an *actio utilis* to be granted him against a colleague of the man who was nominated.

13 PAPINIAN, *Questions, book 2:* What, then, if one of two magistrates is away for the whole year or if, despite being present, he does not undertake business in the public sphere because of ill-will or incompetence or ill-health and his colleague administers everything by himself, but cannot complete the business in hand himself? This is the order in which to proceed: First of all the man who did undertake business in the public sphere and those who acted as his sureties should be sued for the total sum; then, when they have all been exhausted, the man who nominated an unsuitable magistrate must accept liability and finally the other of the two magistrates, who did not undertake business in the public sphere. Nor will he who nominated the magistrate be right if he rejects liability for the whole matter, since he should have realized that he who was nominated would undertake an office as an undivided and a joint liability. For even if both did undertake business and what was necessary could not be done by the one, he who nominated his colleague would be involved for the whole matter.

14 PAPINIAN, *Questions, book 15: Municipes* are regarded as knowing what is known by those to whom the highest affairs of the community are entrusted.

15 PAPINIAN, *Replies, book 1:* Someone who has been removed from the *ordo* of decurions for a time and then returned is not admitted to officeholding for as long as he lacks the rank [of decurion] by analogy with someone who has been banished. But in both cases, it was thought right for there to be an examination of the offense for which the men in question suffered a sentence of that kind. For those who suffer the more severe penalties may later be relieved of censure on the grounds that the affair is over, while those who suffer penalties less severe than the laws allow may nonetheless remain among those branded with *infamia*, since the investigation of facts lies within the capacity of the judges, but not the authority of the law. 1. It is not right for an

action to be granted against a man who nominated his successor at his own wish, if after the magistracy is completed the successor turns out to have been satisfactory. 2. Property transferred by tacit agreement in order to avoid civil *munera* is forfeit to the imperial treasury, and a sum equivalent to what has been forfeited must also be paid by the transferee from his own property. 3. The rule of origin in engaging in officeholding and undertaking *munera* is not changed by adoption; but the son is constrained to undertake in addition new *munera* through his adoptive father.

16 HERMOGENIAN, *Epitome of Law, book 1:* But if someone is emancipated by his adoptive father, he not only ceases to be his son but also a citizen of that community of which he had become a member by adoption.

17 PAPINIAN, *Replies, book 1:* A freedman is not excused from civil *munera* on account of his patron, nor is it relevant to the case whether he is performing tasks for his patron or service for someone who is blind. 1. The freedmen of senators, however, who are managing the affairs of their patrons, are relieved of tutelage by decree of the senate. 2. Let us assume that a father wished his son to be decurion; the community must sue the son in his own person before the father in appendage to the person of the son; nor will it be relevant to the case if the son possesses only a *castrense peculium*, whether he served in the army before or after. 3. The prescribed intervals, which apply to the repetition of an office or the undertaking of another, related to one community and not to a combination of communities. 4. But the same person must not hold office in two communities at the same time; so when office is conferred at the same time in both places, origin provides the grounds which decide acceptance. 5. The mere grounds of ownership of property are not adequate for the imposition of civil *munera* on the owner in question, except in the case of a special dispensation granted expressly to the community. 6. Those who have returned to their *patria* by *postliminium* are forced to undertake *munera*, even though they live within the territory of another community. 7. The *munus* of raising tribute is not regarded as being among the base *munera* and so is imposed also on decurions. 8. Someone who is manumitted on the grounds of a *fideicommissum* adopts the origin of the manumitter in matters of civil *munera*, not of the man who bequeathed him his liberty. 9. The deified Pius thought it right to reply that one taken into an adoptive family should also perform public services in the place of origin of his natural grandfather, although not even a suspicion of fraud was at stake in his case. 10. The error of someone who thinking that he was a *municeps* or colonist promised to undertake civil *munera* does not exclude the claim of the law. 11. The domicile of the father does not bind a son who is the *incola* of another community to perform civil *munera* in a community not his own, provided that as far as the person of the father is concerned the nature of his domicile is only temporary. 12. It is not proper for those who are cited in court for capital offenses to be admitted to further office before the case is finished; but they retain their earlier rank in the meanwhile. 13. The mere possession of a house, which is acquired in another community, does not constitute domicile. 14. The risk involved in nominating a successor does not involve the verbal guarantor of the man nominating. 15. Verbal guarantors who have sworn that any loss of public property will be indemnified and those who nominate magistrates at their own risk are not liable to any penal action to which those for whom they have acted become subject. For it is enough for loss to the community to be made good, which seems to be what is being promised.

18 PAUL, *Questions, book 1:* The deified Severus issued a rescript to the effect that intervals in time between successive offices are a concession to the unwilling, not also to the willing, always provided that no one may repeat an office without a break.

19 SCAEVOLA, *Questions, book 1:* What the majority of the senate decides is treated as the decision of the entire body.

20 PAUL, *Questions, book 24:* Domicile is transferred by actual action, not by mere assertion, as is established in the case of those who say that they cannot be called on for *munera*, since they are *incolae*.

21 PAUL, *Replies, book 1:* When Lucius Titius was in the power of his father, he was appointed by the magistrates as a curator, along with others, for the purchase of corn against the wishes of his father; Lucius Titius did not agree to the appointment and did not receive the money and did not provide sureties for it or involve himself in the purchases along with

the others; and after the death of his father, he began to be approached for the debts of his colleagues. The question is whether he can be held liable on such grounds. Paul replies that someone who declined to undertake a *munus* imposed by the magistrates can be sued under this head on account of loss to the community, even though at the time when he was appointed he was in the power of another. 1. Paul also replies that those who are sued on behalf of others not as a result of a contract, but as a result of the office which they have held are usually involved to the extent of the amount of the loss, but not also for interest. 2. He also replies that the heirs of a man cannot legally be sued on account of the *munera* of a son, which he undertook after the death of his father. This reply also covers someone who, although made a decurion by his father, undertook the *munera* after the death of his father. 3. Paul also replies that someone who has adopted a decurion is regarded as having accepted the burdens of his decurionate on the analogy of a father at whose wish his son has been made a decurion. 4. Paul also replies that during a marriage the dowry forms part of the goods of the husband; but further, if people are called on for municipial *munera* above a certain property level, the dowry ought not to be reckoned in. 5. Paul also replies that even if an accuser in a case involving a capital offense had not arranged for the offense to be dealt with within a year, the defendant should not have sought office in the meanwhile. 6. The Emperors Severus and Antoninus, Augusti, to Septimius Zeno. As concerns the infant son, whom you wished to be decurion, although you have bound your credit for the future, you should not, in the meanwhile, be forced to undertake the burdens, since you seem to have expressed your will over things which can be mandated. 7. Paul also replies that if a community has no specific law about the admission of adjudications, it is not possible to withdraw from a renting out or sale of public property once it is completed; for the times laaid down for adjudications relate to cases involving the imperial treasury.

22 PAUL, *Views, book 1:* The sons and freedmen of freedmen adopt the domicile and origin of their father or manumitting patron respectively. 1. A widowed woman retains the domicile of the husband she has lost on the analogy of a woman who has become a *clarissima persona* because of her husband. But both domicile and origin change if a second marriage takes place. 2. Freedmen are *municipes* also in the place in which they have themselves established domicile of their own volition; nor does this involve any prejudice to the origin of the patron; and such freedmen are bound to perform *munera* in both places. 3. Someone who has been exiled has a temporary domicile under constraint in the place to which he has been exiled. 4. A senator who is removed from the *ordo* is not restored to his original *patria*, unless he has specially been granted this. 5. Senators and their sons and daughters, at whatever time they are born, likewise their grandsons and great-grandsons if on a son's side, are detached from their origins, although they retain their rank and their municipalities. 6. Senators who have been granted freedom of movement, that is, the right to live where they wish, retain domicile at home. 7. Those who lend at interest must fulfill all the payments of tax due on their *patrimonium*, even if they do not have possession.

23 HERMOGENIAN, *Epitome of Law, book 1:* Someone who attains senatorial rank ceases to be a *municeps*, as far as *munera* are concerned, but as far as his status is concerned, he is regarded as retaining his origin. Finally, those who are manumitted by him are made *municipes* of the municipality from which he originates. 1. A soldier is regarded as having his domicile where he serves, if he has no possessions in his *patria*.

24 SCAEVOLA, *Digest, book 2:* The constitutions of the emperors contain the provision that interest is not due on money which is paid to make good a loss. And, therefore, the Emperors Antoninus and Verus issued a rescript in these words: "It is humane that interest on debts should be exacted neither from the man who is indebted as a result of the administration of his office nor from his verbal guarantor and even less

should it be exacted from the magistrates who accepted the *cautio*; it follows from this that no deviation should be made from the customary rule in the future either."

25 ULPIAN, *Praetor's Edict, book 1:* When municipal magistrates administer the magistracy, they then undertake the task of one man; and this is usually in fact laid down for them in the *lex municipalis*; but even if it is not, as long as it is not excluded, it fits what is customary.

26 PAUL, *Edict, book 1:* A municipal magistrate cannot do those things which pertain more to *imperium* than to jurisdiction. 1. *Restitutio in integrum* is not within the competence of a municipal magistrate, nor an order for possession of goods to preserve either property or dowry or legacy.

27 ULPIAN, *Edict, book 2:* A man who is manumitted is fellow *municeps* of the man who manumitted him, adopting not his domicile, but his *patria*. And if he has as *patronus* a *municeps* of two communities, he will by manumission be a *municeps* of those two communities. 1. If anyone conducts his business not in a colony, but always in a municipality, sells, buys and contracts there, frequents the forum, bath and entertainments there, celebrates festivals there, in fact enjoys all the facilities of a municipality and none of those of colonies, he is regarded as having his domicile rather there than where he goes in order to cultivate [the land]. 2. Celsus, in the first book of his *Digest*, discusses the case of someone who is equally at home in two places and does not spend longer in the one than the other; one must establish where he has his domicile from his full intention. I myself doubt, if someone lives in both places with full intention, whether he can have a domicile in two places. It is true that it is possible to hold two, but it is difficult, just as it is difficult for anyone to be without a domicile. I think, however, that even this can happen, if someone leaves his domicile and travels by sea or land, seeking somewhere to go and establish himself; I think that such a person has no domicile. 3. However, even an exile can have a domicile in that place from which he is excluded, as Marcellus writes.

28 PAUL, *Edict, book 1:* Action will be taken before the municipal magistrates also between those who agree about the greater part [of what is at issue].

29 GAIUS, *Provincial Edict, book 1:* An *incola* must obey both the magistrates of the place where he is an *incola* and those of the place where he is a citizen; nor is he subject only to municipal jurisdiction in both municipalities, but he must also perform all public *munera*.

30 ULPIAN, *Edict, book 61:* Whoever is born in a village is regarded as a member of the *patria* to which the village in question belongs.

31 MARCELLUS, *Digest, book 1:* There is no barrier to anyone having his domicile where he wishes, provided somewhere is not forbidden to him.

32 MODESTINUS, *Distinctions, book 4:* A woman who is betrothed does not change her domicile before the marriage is contracted.

33 MODESTINUS, *Manumissions, sole book:* Rome is the common *patria* of us all.

34 MODESTINUS, *Rules, book 3:* An *incola* who has been designated for the performance of public *munera* cannot renounce his position unless the *munus* has been completed.

35 MODESTINUS, *Grounds for Release, book 1:* One must realize that someone who remains in the country is not regarded as an *incola*; for someone who does not use the facilities of the city in question is not therefore regarded as being an *incola*.

36 MODESTINUS, *Replies, book 1:* A letter was sent to Titius by the magistrates of his *patria*, when he was in Rome for his studies, asking him to offer to the emperor a decree of the community in question, which had been sent with the letter. However, the man who had undertaken to deliver the letter coming to a secret understanding gave it to Lucius Titius, who was himself also at Rome for his own purposes; he removed

the name of Titius, wrote his own name instead, and so gave the decree to the emperor according to the mandate of the community. The question arises of who could have asked for a traveling allowance from it; and also what is considered to be the offense of the man who did not give the letter to the person for delivery to whom he had accepted a mandate and of the man who gave the decree to the emperor as if he himself had been instructed by his *patria,* having removed someone else's name and written his own instead. Herennius Modestinus replies that Titius could not ask for a traveling allowance, but rather the man who wrote his own name. 1. Titius accepted a pledge for public money which he himself lent out, having made an agreement with the borrower that if the debt were not paid the pledge would be forfeit without any counterpromise. Magistrates succeeding to the place of Titius recognized the debt and the pledge, down to Maevius. When the pledge was sold, it was not enough to cover the debt, because of a counterpromise made by the magistrates to the sellers concerning the established extent of the land. The question is who is liable to the community. Herennius Modestinus: "I replied that Titius was not bound in respect of this debt because his successors accepted the risk of the debt; but nor are the magistrates who sold [the pledge] involved, since of course they sold it for more because of the evidence for the size of the land and were ordered to restore the difference in price when the lesser extent of the land was realized. So the man who most recently approved the debt must make good the loss of the community unless he can be shown to have transmitted the debt to a satisfactory successor.

37 CALLISTRATUS, *Judicial Examinations, book 1:* Examination of the rights of all *incolae* whom any community claims, lies with the provincial governors. But when anyone claims that he is not an *incola,* he must appear before the governor of the province in whose care lies the community which is calling on him for *munera,* not in the province of the community from which he himself claims to originate. This is the purport of a rescript of the deified Hadrian. 1. The freedmen of a woman who is born in one place and married in another must perform their *munus* in the place from which she, their patron, comes and where they themselves have their domicile. 2. One must realize that women who have not given themselves in statutory marriage must perform *munera* where they themselves originate and not where their husbands originate. This is the purport of a rescript of Antoninus and Verus.

38 PAPIRIUS JUSTUS, *Constitutiones, book 2:* The Emperors Antoninus and Verus, Augusti, issued a rescript to the effect that they gave a dispensation from the oath to a man who had sworn he would not be a member of the *ordo* and was later made *duumvir.* 1. They also issued a rescript to the effect that it was right for tenants of estates of the imperial treasury to perform *munera* provided the imperial treasury did not suffer and that it fell to the governor in association with the procurator to examine the issue. 2. The Emperors Antoninus and Verus issued a rescript to the effect that it was part of the duty of magistrates to exact the money of a legacy and that if they failed, they or their heirs were to be sued or, if they could not pay, their verbal guarantors or those who went surety for them. 3. They also issued a rescript to the effect that a woman as long as she was married was regarded as an *incola* of the community to which her husband belonged and was not compelled to perform *munera* in the place of her origin. 4. They also issued a rescript to the effect that the property of a father who had emancipated his son specifically in order not to stand surety for his magistracy was forthwith liable as if he had become a verbal guarantor for him. 5. They also issued a rescript to the effect that if the question arises whether someone is a *municeps,* it is right for proof to be drawn from the very facts; for the mere similarity of a name was not adequate to confirm anyone's origin. 6. The Emperors Antoninus and Verus issued a rescript to the effect that it was necessary to provide surety for those who held office under compulsion as much as for those who recognized their duty of their own free will.

2

DECURIONS AND THEIR SONS

1 ULPIAN, *Opinions, book 2:* A governor will take care to recall to their native soil decurions who are proved to have left their seats in the community to which they belong and to have migrated to other places and see that they perform the appropriate *munera.*

2 ULPIAN, *Disputations, book 1:* Anyone who has been temporarily exiled, if he is a decurion, ceases to be a decurion. If he returns, he will clearly not recover his position, but is not debarred from ever becoming a decurion again. In any case, he will not be restored to his own position (for it is indeed possible for someone to be co-opted into his position), and, if the number in the *ordo* is complete, he will have to wait until another position is vacant. The position of someone who is temporarily removed from the *ordo* is different. For when the time is up, he is a decurion again. But it is also possible for someone to be co-opted into this position, and so if he finds his position filled, he will have to wait until a position is vacant. 1. A question arises, however, as to whether someone who has been restored to the *ordo* has that position [of seniority] which he had originally or that which he has just acquired, if it happens that the sequence in which votes are cast is at issue. I think, however, that he has the same position which he had originally. The same will not apply to someone who has been temporarily exiled; for he comes into the *ordo* as a newcomer. 2. The question arises in the case of sons of decurions whether the only person who is regarded as the son of a decurion is the one who was conceived and born while he was decurion or whether the one who was born before his father became decurion is also included. And, indeed, as far as his immunity to flogging or servitude in the mines is concerned, it makes no difference if he is born from a humble father, if the honor of the decurionate is later conferred on his father. Papinian replies that the same also applies if the grandfather is a decurion, in order that a son may not be marked by his father's disgrace. 3. But if his father is removed from the *ordo,* at any rate, if this happens before his conception, I think that he is considered the son of a humble father as far as officeholding is concerned. For if his father loses his rank after his conception, one must generously admit that he is to be regarded as the son of a decurion. 4. Further, also, the man who is born after his father's exile, provided that he was conceived before it, will be regarded as equal to the son of a decurion; but if he was conceived after, the exile will make a difference to him. 5. If he is born to a father temporarily removed from the *ordo* and was both conceived and born in the period in question, can he be regarded as born as it were the son of a decurion, even though his father died before he returned to the *ordo*? It must be generously admitted that he can. 6. Furthermore, if he was conceived by a humble father and in due course before his birth his father both gained and lost the status of decurion, one will respond favorably that the period in question benefits him as if he had been born. 7. No crime of the father can cause a penalty to an innocent son; and so he is not debarred from the *ordo* of decurions or other offices for any such cause. 8. Those who are older than fifty-five are debarred by *constitutiones* from being called on for the office of decurion against their will. But if they have agreed to this, they ought to hold office, even if they are over seventy, but are not forced to perform civil *munera.*

3 ULPIAN, *Duties of Proconsul, book 3:* It will always be necessary to ensure that anyone who has suffered a milder sentence by reason of his having been temporarily exiled should reckon as gain the humanity of his sentence and not recover his decurionate. 1. But if anyone is not temporarily exiled, but temporarily removed from the *ordo,* even for the crime of forgery or any other of the graver crimes, he is in a position to be able to return to the *ordo.* For the Emperor Antoninus deliberately laid down by edict that anyone, who for any reason had been temporarily debarred from the *ordo* or from serving as an advocate or from any other duty, should, nonetheless, when the time was up, be able to hold the office or perform the duty. This is right; for a sentence

which had placed a limit on the period of debarring is not to be made heavier. 2. There is no doubt that bastards can be co-opted into the *ordo*; but if one has as a competitor someone conceived legitimately, it is right for him to be preferred, as the deified brothers noted in a rescript to Lollianus Avitus, the governor of Bithynia. But if such people are lacking, bastards of honorable estate and conduct will also be admitted to the decurionate; nor will this be a disgrace to the *ordo*, since it is in its interest for the *ordo* always to be at full strength. 3. The deified Severus and Antoninus allowed those who profess the Jewish superstition to hold office, but also imposed on them only those obligations which would not damage their superstition.

4 MARCIAN, *Criminal Proceedings, book 1:* A decurion, who is debarred from hiring anything, if he found himself as lessee of something as a result of a legitimate inheritance, remains so. This principle is to be observed in all similar cases.

5 PAPINIAN, *Questions, book 2:* It was decided that anyone temporarily removed from the *ordo* for an offense which involves ignominy should be removed permanently, but that those ordered to go into exile temporarily for a less serious offense should not be ranked among the *infames* on the grounds that the matter has been dealt with.

6 PAPINIAN, *Replies, book 1:* Bastards become decurions; and this will also be possible for someone born out of incest; for no barrier must be placed in the way of the advancement of someone who has done no wrong. 1. Those under twenty-five who have been made decurions receive the *sportulae* of decurions; but for the time being they are not entitled to vote along with the rest. 2. A decurion is also debarred from contracting for the collection of the revenues of his own *civitas.* 3. Those who have abandoned the investigation of a criminal charge, unless there has been granted the concession of an amnesty, may not be graced with the rank of decurions, since those condemned in criminal proceedings are branded with ignominy under the *senatus consultum Turpillianum* as if for calumny. 4. A father who appealed when his son was made decurion, even if he is ruled out of court by the prescription of time, provided that he did not endorse what was done, will not be held liable for civil *munera* on behalf of his son. 5. If other special dispensations are irrelevant, those who are graced with the position of decurion by several nominations at the same time are to be placed first in the order of voting. But in addition, anyone who has several children is asked to vote first in his college and takes precedence over the others in the matter of rank.

7 PAUL, *Views, book 1:* Offices and *munera* are not to be bestowed as a matter of course but on everyone who is most suitable. 1. Those who are deaf or dumb, if they are completely deaf or completely dumb, are excused from civil offices, but not also from *munera.* 2. Someone who is not a decurion cannot hold the duumvirate or other offices, because plebeians are debarred from holding the office of decurions. 3. A father is deemed not to consent to the decurionate of his son if he has formally declared his wish to the contrary either in the court of the governor or in the *ordo* itself or in some other way.

8 HERMOGENIAN, *Epitome of Law, book 1:* It is possible for *alimenta* to be voted to decurions who have lost their livelihoods, especially if they have exhausted their patrimony by munificence to the *patria.*

9 PAUL, *Decrees, book 1:* Severus Augustus said: "Even if it were proved that Titius had been born while his father was a slave, still, since he was born from a freewoman, he is not debarred from becoming a decurion in his own *civitas.*" 1. There is no doubt that it is not proper to make *navicularii* decurions.

10 MODESTINUS, *Replies, book 1:* Herennius Modestinus replied that a man is not made decurion by the mere posting of the list of members, if he has not been legally elected decurion.

11 CALLISTRATUS, *Judicial Examinations, book 1:* Not only those who are of tender age but also those who are elderly are debarred from becoming decurions. The former

are temporarily excused as unable to administer public business, the latter are permanently excluded. But mature men are not debarred, lest by the release of mature men young men should be burdened by being the only ones left to undertake all public *munera*. For those who are younger than twenty-five may not be made decurions except for some special reason, nor may those who have passed fifty-five. Sometimes also account will need to be taken of long established custom in these matters. In fact, our emperors, when consulted about including men of this age in the *ordo* at Nicomedia, issued a rescript that custom was to be followed.

12 CALLISTRATUS, *Judicial Examinations, book 6:* It is not proper to ignore as base persons those who deal in and sell objects of daily use, even though they are people who may be flogged by the aediles. Indeed, men of this kind are not debarred from seeking the decurionate or some other office in their own *patria*; for they do not suffer from *infamia*. Nor indeed are those who have actually been flogged by the aediles excluded from office, even if the aediles were within their rights in performing that act. Nonetheless, I think it is dishonorable for people of this kind who have been subjected to flogging to be admitted to the *ordo*, and especially in those *civitates* which have plenty of men of standing. For if there is a shortage of those who are bound to perform public *munera*, it follows that even these may hold local office, if they possess sufficient substance.

13 PAPIRIUS JUSTUS, *Constitutiones, book 2:* The Emperors Antoninus and Verus, Augusti, issued a rescript to the effect that those who had been temporarily exiled and had returned would not be admitted into the *ordo* without the permission of the emperor. 1. They also issued a rescript to the effect that those who had been exiled would not be admitted to the *ordo* of decurions when the time was up unless they were of such an age that they were not yet eligible to be elected decurions and their rank, by reason of the expectation of office which it carried, made it possible for the emperor to grant the favor. 2. They also issued a rescript to the effect that someone who was born in exile was not debarred from holding the office of decurion. 3. They also issued a rescript to the effect that if someone wished to state that a man had not been properly elected decurion, his plea was not acceptable, since he should have stated this at the outset.

14 PAUL, *Questions, book 1:* The deified Pius issued a rescript to the effect that a decurion who had been condemned should not be tortured. Whence it follows also that even if he has ceased to be a decurion and is then condemned, he may still not be tortured out of respect for his former rank.

3

COMPILING THE LIST OF MEMBERS

1 ULPIAN, *Duties of Proconsul, book 3:* Decurions must be recorded in the list, as the municipal charter prescribes; but if the charter does not cover a case, then rank will need to be considered, so that they are recorded in the same order as that in which they each held the highest office of the municipality: thus, first those who have held the duumvirate if this office is the highest, and among them the most senior first; then, those who have held the office which follows next after the duumvirate in the community; then, those who have held the third highest office and so on; finally, those who have held no office, in the order in which each of them entered the *ordo*. 1. The same order is also to be observed in casting votes as we have prescribed for the compilation of the list.

2 ULPIAN, *Opinions, book 2:* In the list of decurions in a municipality, the names of those who have achieved [imperial] office on the recommendation of the emperor must be recorded first and then the names of those who have simply held municipal office.

4

MUNERA AND OFFICES

1 HERMOGENIAN, *Epitomes, book 1:* Among civil *munera*, some attach to a *patrimonium*, others to persons. 1. Patrimonial *munera* are those relating to the land transport system and to the office of *navicularius*; the office of *decemprimi*, for these men collect the regular taxes at their own risk. 2. Personal civil *munera* are the defense of one's community, that is, the appointment as advocate; an embassy to receive census assessments or acquire a *patrimonium*; *scribatus*; camel-management; the supervision of the corn supply and similar matters; the supervision of public land; the supervision of corn purchases; the supervision of the water supply; the provision of race horses for the games; the upkeep of a public road, corn funds, heating for baths; the distribution of the corn supply and some other duties similar to these. For other duties also can be grasped under the laws of each community by analogy with those which we have listed, because of established custom. 3. In general, something is to be regarded as a personal *munus* if it regularly arises from bodily activity together with the conscientious exercise of the mental faculties; as a patrimonial *munus* if it particularly involves expense. 4. Equally, tutelage is a personal *munus*, the care of a grown-up or of a madman, likewise of a spendthrift, a dumb person or of an unborn child, even to the extent of providing food, drink, shelter, and so on. But in addition, there is a curator provided for the goods of someone who is away, by whose activity usucapion is prevented and who sees that debtors are not released; similarly, if possession of goods is sought under the Carbonian Edict and satisfaction is not given, a curator provided for the management of the goods undertakes a personal *munus*. Similar to these men are those who are provided as curators for the goods formerly belonging to someone who has been captured by the enemy and whose return is hoped for; likewise, curators provided for the management of the goods left by someone to whom no one has yet succeeded either under civil or under statute law.

2 ULPIAN, *Sabinus, book 21:* As far as office is concerned, a man is regarded as having his son in his power even if he is in the power of his father.

3 ULPIAN, *Opinions, book 2:* Even those who originate from the city of Rome, if they take up domicile in another place, are obliged to undertake its *munera*. 1. No municipal *munus* can be imposed on those who are concerned with building camps in the course of military activity. But other private persons, even if they are the relatives of soldiers, are obliged to obey the laws of their *patria* and *provincia*. 2. If someone condemned to the mines is granted *restitutio in integrum*, he may be summoned to undertake *munera* or hold office, as if he had never been condemned. Nor will he regard his misfortune and sad mischance as militating against his being regarded as a suitable citizen of his *patria*. 3. Their very sex prevents women from undertaking *munera* involving bodily activity. 4. A father, whose son is in his power, does not have the right of blocking his son from holding office and undertaking *munera*, if he has no grounds for exemption. 5. The fact that a father did not agree to the offices or *munera* of his son, in order that his *patrimonium* might not bear the burden, provides a defense, but does not remove a citizen from the service of his *patria* to the extent of his capacity. 6. Even if one is over seventy-five or the father of five living sons and is therefore exempt from civil *munera*, nonetheless, his sons are obliged to assume the relevant *munera* on his behalf; for the appropriate reward of immunity is thus given to fathers on account of their sons because they themselves will undertake the *munera*. 7. A step-father is not obliged to undertake the burdens of civil *munera* on behalf of his step-son by any legal rule. 8. Freedmen are obliged to undertake *munera*

in the place of origin of their patrons, but only if they have *patrimonia* which will be subject to the burdens; for the property of patrons is not subject to the *munera* of freedmen. 9. The fact that a father is on trial for some offense is not to be treated as a barrier to the sons holding office. 10. Even those who are under twenty-five were long ago allowed to be *decaprotoi* (*decemprimi*), though not while in the army, since this seems to be more a patrimonial burden. 11. It is agreed that the collection of taxes is a patrimonial burden. 12. The supervision of corn purchases is a *munus*, and the age of seventy or the possession of five living sons confers exemption. 13. Those on whom the burden falls of providing accommodation for those soldiers who are entitled to receive it when they come to the community are all to undertake it in turn. 14. The *munus* of accommodating someone in one's house is a patrimonial and not a personal burden. 15. The governor of a province is to see that *munera* and offices are fairly distributed in turn in the cities, according to age and rank, following the levels of *munera* and offices originally established, in order that the cities may not be left in the lurch if the same men and the same estates are frequently and unsystematically burdened. 16. If there are two sons in the power of their father, he is not compelled to undertake their *munera* at the same time. 17. If someone who left two sons did not in his last dispositions arrange to provide for the *munera* of the one son out of their shared patrimony, the one on whom *munera* and offices are imposed is obliged to undertake them at his own expense, even though the father, if alive, would have provided for burdens of that kind on his behalf.

4 ULPIAN, *Opinions, book 3:* The supervision of the building or repair of a public building in a community is a public *munus* from which the father of five living sons is exempt; nor will he lose the exemption which he has from other *munera* if this *munus* was imposed by force. 1. A temporary, not a permanent, exemption is conferred on those who lack the resources for the *munera* or offices which are imposed; for if a *patrimonium* is increased by honorable means according to desire, an estimate will be made at the appropriate time whether someone is suitable for the function to which he has been appointed. 2. The poor do not undertake patrimonial burdens because of the actual constraint of destitution, but they perform the services which are prescribed for their bodies. 3. Someone who was bound to perform the *munera* of his community put his name down for the army in order to avoid this municipal burden; but he was unable to weaken the claim of his community.

5 SCAEVOLA, *Rules, book 1: Navicularii* and traders in olive oil, who have tied up a large part of their patrimony in the business, have an exemption from any public *munus* for five years.

6 ULPIAN, *Duties of Proconsul, book 4:* The following declaration is made in a rescript of the deified brothers to Rutilius Lupus: "The *constitutio* in which it is laid down that men should also hold magistracies in the same order as that in which they are made decurions is always to be observed whenever it happens that all the men involved are suitable and satisfactorily endowed. But if some of them are so poor and destitute that they are not only not up to public office, but can scarcely even live off their own property, it is not expedient and quite dishonorable for a magistracy to be entrusted to such men, especially if there are men who can hold it without damage to their own fortune or to the reputation of the community. So those who are better off must realize that they may not use this legal pretext and that investigation is only to be made of the date at which each man was adlected into the *curia* as between those who because of their wealth are entitled to the dignity of office." 1. It is certain that public debtors cannot be invited to hold office, unless they have earlier provided security to the community for what is owed. But we ought, however, to regard those as public debtors who are left in this position as a result of their administration of the community. But if they are not debtors as a result of the administration of the community, but have borrowed money from the community, they are not in the position of needing to be debarred from office. It is clearly adequate as an alternative to payment,

if someone provides suitable pledges or verbal guarantors; and this was the purport of a rescript of the deified brothers to Aufidius Herennianus. But if they owe money as a result of a unilateral promise, even if this unilateral promise cannot be refused, they are in the position of needing to be debarred from office. 2. If someone does not have an accuser, he is not to be debarred from office, any more than someone whose accuser has abandoned the case. For this was the purport of a rescript of our emperor with his deified father. 3. One must realize that some *munera* are personal or patrimonial, likewise some offices. 4. *Munera*, which are imposed on *patrimonia*, or levies are such that neither age nor the number of children nor any other prerogative, which regularly relieves someone of personal *munera*, is any excuse. 5. But in fact the *munera*, which are imposed on *patrimonia*, are of two kinds; for some are imposed on owners of property, whether they are *municipes* or not, some only on *municipes* or *incolae*. Levies, which relate to land or buildings, are imposed on their owners; but *munera*, which are held to be patrimonial, are only imposed on *municipes* or *incolae*.

7 MARCIAN, *Criminal Proceedings, book 2:* A defendant is debarred by imperial *constitutiones* from seeking office even before sentence; nor does it make any difference, whether he is a plebeian or a decurion. But he is not debarred from seeking office once a year has passed from his becoming a defendant, unless it was his fault that the case was not heard within a year. 1. The deified Severus issued a rescript to the effect that a man against whom an appeal has been lodged over the holding of office is to be subject to *coercitio* if he usurped the office while the appeal was pending. So also if someone who has been debarred by a sentence from holding office has appealed, he must in the meanwhile abstain from seeking office.

8 ULPIAN, *Edict, book 11:* It is not proper for *minores* before their twenty-fifth year to be admitted to the administration of the community or to *munera* other than patrimonial or to office. Indeed, they are not appointed as decurions or if appointed do not vote in the *curia*. But the twenty-fifth year once begun is regarded as completed [for this purpose]; for it has been laid down as a favor as far as office is concerned that we should accept years as completed once begun, but only for those offices in which no property of the community is entrusted to them. Indeed, one must not admit that office can be entrusted to someone if it involves public loss as well as the ruin of the *minor* himself.

9 ULPIAN, *Duties of Consul, book 3:* If anyone who has been appointed a magistrate in a municipality declines to perform the *munus* imposed on him, he is to be forced by the governors to accept the burden, by the same means by which tutors are regularly forced to accept the burden imposed.

10 MODESTINUS, *Distinctions, book 5:* A *munus* cannot be imposed on someone who is holding office; office cannot be entrusted to someone who is undertaking a *munus*.

11 MODESTINUS, *Encyclopaedia, book 11:* It is laid down by edict that offices should be conferred in due order and, in a letter of the deified Pius to Titianus, that one should move from the lesser to the greater. 1. This is true even if it is prescribed in the *lex municipalis* that men of a certain status should be preferred for offices; it must, however, be realized that this provision is to be observed if the men are suitable; and this is what is contained in a rescript of the deified Marcus. 2. Whenever there is a shortage of men who undertake office, immunity is in some respect breached, as is laid down in a rescript of the deified brothers. 3. The deified Magnus Antoninus issued a rescript with his father to the effect that a doctor can be rejected by a community, even if he has originally been approved. 4. The deified Magnus Antoninus issued a rescript to the effect that those who teach children to begin to read do not have exemption.

12 JAVOLENUS, *From Cassius, book 6:* Someone who is granted exemption from a public *munus* is not granted the right not to become a magistrate, because that is more honorific than burdensome. Everything else, which is occasionally demanded specially, like road building, is not to be demanded from such a person.

13 JAVOLENUS, *From Cassius, book 15:* Exemption and likewise immunity, which are given to the children and descendants of someone, relate to them as long as they are of that family.

14 CALLISTRATUS, *Judicial Examinations, book 1:* Municipal office is the administration of the community with an official position, whether it involves expense or not. 1. A *munus* is either public or private. Something is called a public *munus* if we undertake it in the course of administering the community and are involved in expense but have no formal

position. 2. Road-building and levies on properties are *munera* not of a person, but of places. 3. If one is concerned with the holding of office or the undertaking of *munera*, in the first place one must consider the character of the man on whom this office or administration of the *munus* is conferred; likewise, his place of birth; also his property, whether it is sufficient for the *munus* in question; likewise, the law under which everyone must perform *munera*. 4. Plebeian sons-in-power will be bound at the risk of the man who nominated them, as our Emperor Severus Augustus laid down in a rescript of these words: "If your son is among the plebeians, although you ought not to be forced against your will to undertake office on behalf of your son, nonetheless, you cannot rely on parental power to prevent him serving his *patria* at the risk of the man who nominated him." 5. The possibility of holding office is not unregulated, but there is a fixed order for this. For a man may not hold the more important magistracy before he has held the less important one, nor at any age, nor may anyone hold offices in succession. 6. It is laid down in several *constitutiones* that if there is no one else to hold office, those who have held it are to be forced to do so again. The deified Hadrian issued a rescript about the repetition of *munera* in these words: "I agree to this, namely that if there are no others suitable to perform this *munus*, men should be appointed from among those who have already performed it."

15 PAPINIAN, *Replies, book 5:* Even if a father wished his son to be decurion, nonetheless, when the father has died, the appropriate offices which after his death have fallen to the son who is decurion do not relate to the burden of the son who is joint heir, even if his father left him property sufficient for him to be decurion.

16 PAUL, *Views, book 1:* Those who offer an equivalent of money for an office or a *munus* instead of accepting it are not to be heard. 1. Anyone who has promised money in return for office, if he has begun to pay it, is to be forced to provide the whole, by analogy with someone who has begun a piece of work. 2. A son is not forced against his will to provide surety on behalf of his father that the property of the community will not suffer. 3. No one is forced to undertake the defense of his community more than once, unless necessity demands that that should happen.

17 HERMOGENIAN, *Epitome of Law, book 1:* No one is debarred from holding again of his own free will the priesthood of a province. 1. If someone who is exempt from offices and civil *munera* agrees to the appointment of his son, who is in his power, as decurion, he is compelled to help with his expenses in his *munera* and offices.

18 ARCADIUS CHARISIUS, *Civil Munera, sole book:* There is a triple division of civil *munera*; for some are personal, some are called patrimonial, some are mixed. 1. The personal ones are those which are carried out by mental application and by the deployment of bodily effort without any loss to the man undertaking them, like tutelage or care, also the care of the account book. 2. And the quaestorship in some communities is not regarded as an office, but is a personal *munus*. 3. The production of recruits or of horses or of any other animals which have to be produced, or the conveyance or accompaniment of goods, such as money belonging to the imperial treasury, or the provision of care or clothing, any of these is a personal *munus*. 4. The care of the public transport system, likewise the provision of *angariae*, is a personal *munus*. 5. Also, the supervision of the purchase of corn or oil (for supervisors of these goods, who are called *sitonai* and *elaionai* are regularly appointed) fall among the personal *munera* in some communities; and also the heating of the public bath, if the money is given to a supervisor out of the revenues of a community. 6. And further, the supervision of an aqueduct is included among personal *munera*. 7. Also the office of the irenarchs, who are in charge of public order and the regulation of behavior; and further, the office of those who are regularly chosen to build roads, provided that they contribute nothing from their own patrimony toward the *munus*; and *episcopi*, who look after bread and other goods for sale, which serve the daily needs of the people of the various communities, perform personal *munera*. 8. Those who organize or collect or provide the corn supply and those who raise money by the poll-tax support the worry of a personal

munus. 9. And further, the curators who are regularly chosen to collect the public revenues of the various communities are subjected to a personal *munus.* 10. These also are bound to personal *munera,* those who are appointed as custodians of temples or *archeotae* or *logographi* or archivists or *xenoparochi* (as in some communities) or limenarchs or supervisors for the erection or repair of public buildings, whether palaces or shipyards or way stations, provided that they expend public money on the fabric of the building, also those who are placed in charge of building or repairing ships, where custom demands. 11. Likewise, *camelasia* also is a personal *munus;* for if one takes account of food and of the camels, a fixed sum has to be given to the camel-drivers, so that those in charge are bound only to serve with their persons. It has been specially laid down that these men are to be called in the order of the list and are not to be let off on any ground, except that of poor and run-down health or bodily infirmity. 12. Ambassadors also, who are dispatched to the shrine of the emperor, because they are sometimes accustomed to receive travel money, known as *legativum,* along with night watchmen and supervisors of bakeries, undertake a personal *munus.* 13. Likewise, official representatives, whom the Greeks call *syndici,* and those who are chosen to conduct or defend a particular case are involved in the labor of a personal *munus.* 14. The obligation of serving as a judge is also treated as a personal *munus.* 15. If anyone has been chosen to oblige those, who own property near a public road, to pave the road, this is a personal *munus.* 16. Likewise, those who are appointed to receive or register census professions turn their minds to the worry of a personal *munus.* 17. Whip-bearers also who accompany the supervisors of games during the competitions and the scribes of magistrates are tied to a personal *munus.* 18. Patrimonial *munera* are those which are carried out at the expense of the patrimony and at a loss for the person undertaking them. 19. The provision of oil and the organization of the exchange of [worn] coin are regarded as patrimonial *munera* at Alexandria. 20. The receivers of wine for the province of Africa also carry out a patrimonial *munus.* 21. There are, however, two kinds of patrimonial *munera;* for some of these *munera* are imposed on properties or patrimonies, such as the provision of war horses or of mules and of *angariae* and post-horses. 22. So even those who are neither *municipes* nor *incolae* are forced to accept obligations of this kind. 23. And a rescript has been issued to the effect that usurers, even if they are veterans, must accept impositions of that kind. 24. From *munera* of this kind neither a *primipilaris* nor a veteran nor a soldier nor anyone else, who relies on some dispensation, nor a priest is excused. 25. Furthermore, some communities have the right to demand that those who hold properties in their territory provide each year a certain quantity of corn according to the extent of their land; this kind of contribution is a *munus* of a property. 26. The *munera* of *decaprotia* and *icosaprotia* are mixed, as Herennius Modestinus both in treatise and argument well laid down and by the best possible reasoning. For *decaproti* and *icosaproti* in collecting taxes both perform a personal service and make good the losses to the imperial treasury on behalf of all the defaulters, so that it is correct for this *munus* to be regarded as being a mixed one. 27. But those *munera* which we declared above to be personal will fall under the heading of mixed *munera,* if those who perform them also have outgoings from their own resources according to the law of their community or by custom or in collecting the corn supply make good the shortfalls resulting from abandoned properties. 28. All these *munera,* which we have divided into three, share one common characteristic; for personal and patrimonial and mixed *munera* are described as civil or public. 29. Whether, however, exemption is granted to anyone only from personal *munera* or also from civil *munera,* they cannot be excused from the provision of corn or of *angariae* or of post-horses or from billeting or from the provision of a ship or from the collection of the poll-tax, except for soldiers and veterans. 30. Both the deified Vespasian and the deified Hadrian issued rescripts to the effect that teachers who are released from civil *munera* and grammarians and orators and doctors and philosophers had been granted immunity from billeting by the emperors.

5

RELEASE AND EXEMPTION FROM *MUNERA*

1 ULPIAN, *Opinions, book 2:* Every dispensation rests on its own equity. But if credit is given to those who make some claim, without anyone judging the issues, or permission is given at random to everyone to excuse themselves as they please without prescription of time, there will be no one to undertake necessary *munera* in the various communities. So even those who claim for themselves dispensation from civil *munera* on the grounds of possessing living sons must lodge an appeal and those who have not observed the prescribed times in carrying out the process of an appeal of that kind are rightly debarred under this rule. 1. Those who enjoy some dispensation must appeal every time they are appointed, even if they have already been let off. But if the same adversary is shown to be repeatedly appointing someone to bring him into ill repute, in order to trouble a man whom he knows to rest his case on a permanent exemption, he is to be ordered to pay the costs of the case, in line with the decrees of the emperors, to the man whom he has repeatedly troubled without cause. 2. Those who in order to deprive the *ordo* of its due in holding of office, when they were reckoned among those in the community who could be appointed to the highest offices, to avoid greater burdens have transferred themselves to the status of tenants of properties, in order to be subject to lesser burdens, have failed to achieve this dispensation for themselves. 3. Although someone is sixty-five years old and has three living sons, nonetheless, he is not as a result freed from civil *munera.*

2 ULPIAN, *Opinions, book 3:* It is not right for someone in his sixteenth year to be called upon for the *munus* of *sitonia.* But if there is no specific provision in the community about appointing even those under twenty-five to *munera* or offices, the proper age qualification is to be observed. 1. The number of children or the age of seventy does not provide dispensation from office or the *munera* attaching thereto, but only from civil *munera.* 2. Adoptive sons do not count toward the number of those sons, who regularly provide a dispensation for their parents. 3. Those who are called upon to perform *munera* must prove that they have the proper number of living children at the time when they wish to be excused on their account; for if the number of children is achieved later, this does not free a man from *munera* already undertaken. 4. Patrimonial burdens attract no dispensation because of the number of children. 5. Free children, even if they have ceased to be in the power of their father, provide a dispensation from civil *munera.* 6. Someone who is partially deaf does not have immunity from civil *munera.* 7. If the governor realizes that someone is so weighed down by old age and bodily infirmity that he cannot discharge the *munus* of transporting money, he should release him and appoint a replacement. 7a. Bodily infirmity provides an excuse from those *munera* which are discharged merely by bodily activity. But those which can be carried out by the mental application of a sensible man or with the patrimony of a man who is sufficiently well endowed for this purpose are not remitted except for clear and agreed demonstrable reasons. 8. Those who teach children to begin to read and write do not have immunity from civil *munera.* But it is the duty of the governor to see that nothing which is beyond their strength is assigned to any of them whether they are masters in the communities themselves or in the villages.

3 SCAEVOLA, *Rules, book 3:* Exemption from any public *munus* is granted by reason of their ship to anyone who has built a sea-going ship and provided it for the transport of the corn supply of the Roman people, provided it is of not less than fifty thousand

modii capacity, or five or more of not less than ten thousand modii capacity, as long as the ship is in use or another in its place. Senators, however, cannot enjoy this exemption since they cannot ever own a ship under the *lex Julia* on extortion.

4 NERATIUS, *Parchments, book 1:* The duration of an exemption which is granted to those who are away on public business is not to be reckoned as ending on the very day on which someone has returned, but is to allow for some recovery from the journey. For a man is just as much to be regarded as absent on public business if he is on his way to deal with it or on the way back. If, however, someone takes up more than a reasonable time either by delaying on the journey or somewhere else, the exemption is to be so treated as to ensure that the day on which he would conveniently have completed his journey is to count as the first one falling after his period of exemption.

5 MACER, *Duties of Governor, book 2:* Ulpian replied that no exemption from any other office is conferred by the decurionate, although this also is an office.

6 PAPINIAN, *Questions, book 2:* Those who are exempt from public *munera* are not normally forced to undertake those which are demanded in addition to the normal ones.

7 PAPINIAN, *Questions, book 36:* Veterans are released forever from those *munera* which are not imposed on patrimonies, according to the letter of our excellent Severus Augustus.

8 PAPINIAN, *Replies, book 1:* In the conferring of office, neither a man over seventy nor the father of five children is excused. But in Asia those who rely on five children are not forced to undertake the priesthood of the province. This is what our excellent and most great Severus Augustus decreed and later laid down as something to be observed in the other provinces. 1. It was decided that the only contractors for the collection of taxes for the imperial treasury who were released from civil *munera* and tutelage were those who were carrying out their business in person. 2. The privileges involved in exemptions do not relate to the sons of veterans. 3. Someone who possesses exemption from a public *munus* is right to refuse levies imposed without warning by the magistrates; but he must not refuse those which arise under the laws of the community. 4. It was decided that philosophers, who show themselves to be available and useful for those who are seeking to follow that course of study, are exempted from tutelages and likewise from demeaning personal *munera*, but not from those which involve expenditure; for true philosophers despise money and by a desire to retain it reveal that their profession is feigned. 5. If someone has appealed to the most great emperors and set off to Rome to plead his own case, until the hearing is finished, he is released from holding office and performing civil *munera* in his own community.

9 PAUL, *Replies, book 1:* Those who make their claim in Rome are to be excused from *munera* in their own *patria* just as if they had made their claims there. Paul replied that the dispensation granted to those engaged in the corn trade related also to release from holding office.

10 PAUL, *Views, book 1:* No dispensations provide exemption from those burdens which are imposed on property or patrimony. 1. The body of those who measure out the corn in connection with the corn supply of the city has exemption but not in the provinces. 2. The provision of *angarii* and the obligation of accepting billeting are remitted among other things to a soldier and to professors of the liberal arts. 3. People are not excused by pleading poverty if their resources increased in the course of time after the appeal. 4. Advocates of a community are exempt from offices and *munera* at the same time.

11 HERMOGENIAN, *Epitome of Law, book 1:* There are *munera*, which belong specifically with something, from which neither children nor age nor military service nor any other dispensation legally brings release; for instance, on properties falls a levy for making up a road or the provision of *angarii*, the *munus* of billeting (for no one has release from this except for those to whom it has been granted by gift of the emperor) and any other things of this kind in addition.

12 PAUL, *Views, book 1:* Advocacy in the same affair cannot be mandated again to an ambassador who has looked after public business within the prescribed period of exemption. 1. The entourage of governors and proconsuls or procurators of Caesar are exempt from *munera,* offices, and tutelages.

13 ULPIAN, *Edict, book 23:* The praetor undertakes that he will release those whom he knows cannot give their attention to acting as judge; perhaps because someone is permanently unable to give his attention, because he has come to a state of health such that it is clear that he cannot undertake civil duties; or if he suffers from another disease, so that he cannot keep control of his own affairs; or if people have obtained a priesthood of a kind which they cannot abandon without offending what is hallowed. For those also are permanently released. 1. There are two kinds of exemptions of public *munus* which may be given: one full, when it includes exemption from military service; one partial, when people have received simple exemption from a *munus.* 2. Someone who has not been released is forced to act as judge, even against his will. 3. If a judge begins to claim release after the case has been heard, if he wants to claim release on the grounds of a dispensation which he had before he took up the office of judge, he is not to be heard. For he renounces his claim to release by taking on the office of judge. But if later a just reason emerges for a judge to be released perhaps temporarily, he must not be transferred to another court, if that will take place at someone else's disadvantage. In the long run, it is preferable to wait for a while for a judge who has already heard a case rather than to instruct the affair to a new judge to be judged again.

14 MODESTINUS, *Rules, book 7:* A dead son does not help toward release from *munera,* except for one lost in war. 1. The same person will not hold the supervision of two pieces of work at the same time.

6

THE RIGHT OF IMMUNITY

1 ULPIAN, *Opinions, book 3:* Those who are in ships solely in order to work on them for the sake of business do not have immunity from civil *munera* by any *constitutio.* 1. Immunities granted to individuals are not transmitted to heirs. 2. And even those which are granted to and preserved by a family and its descendants do not belong to those who are descended in the female line.

2 ULPIAN, *Duties of Proconsul, book 4:* Faith must be kept with those who have bound themselves to accept *munera* or offices on a certain condition since they could not otherwise be bound against their will to undertake the office in question, and the condition must be observed under which they agreed to attach themselves to the *munera* or offices.

3 (2, 1) ULPIAN, *Duties of Proconsul, book 4:* It is declared by a rescript to Venidius Rufus, the legate of Cilicia, that immature men, although the constraint of shortage of men may cause pressure, are not to be admitted to officeholding.

4 (3) ULPIAN, *Duties of Proconsul, book 5:* Those who are over seventy are exempt from tutelages and personal *munera.* But someone who has begun, but not ended his seventieth year does not enjoy this exemption, since someone in his seventieth year does not seem to be over seventy.

5 (4) MODESTINUS, *Rules, book 6:* Immunities granted generally with the proviso that they would be transmitted to descendants last forever for successive generations.

6 (5) CALLISTRATUS, *Judicial Examinations, book 1:* Old age has always been revered in our state; for our ancestors accorded almost the same honor to the old as to magistrates. In regard also to the liability to municipal *munera,* the same honor is accorded to old age. But it can be said that a man who has become rich in old age without having previously undertaken any public *munus* is not exempted from this

burden by the dispensation of age, especially if the administration of the *munus* imposed involves not so much physical disturbance as expenditure of money, and if he belongs to a community in which men rich enough to perform public *munera* are not easily found. 1. It is also right to consider the law of each place to see whether in listing any immunities by name it mentions age limitations. This can also be inferred from the letter of the deified Pius which he sent to Ennius Proculus, proconsul of the province of Africa. 2. It is made clear in various ways and at length by the rescripts of the deified Helvius Pertinax that the number of children serves for release from municipal *munera*. For he addressed a rescript to Silvius Candidus in these words: "Even if the number of children does not release their fathers from every *munus*, nonetheless, since you have shown in your petition that you have sixteen children, it is not unreasonable to permit you to devote yourself to bringing up your children and to relieve you of *munera*." 3. Men of business who assist the corn supply of the city, likewise, shipowners who serve the corn supply of the city, obtain immunity from public *munera*, so long as they are engaged in this activity. For it has rightly been decided that they should be compensated for the risks they run, and indeed encouraged by rewards to run them, so that men who undertake public *munera* abroad, involving risk and effort, may be freed from disturbance and expense at home; indeed, it is not inappropriate to say that they too are absent on public business while they serve the corn supply of the city. 4. A fixed provision is laid down for the immunity which is granted to shipowners; they alone possess this immunity; it is not also granted to their children or freedmen; and this is laid down in imperial *constitutiones*. 5. The deified Hadrian stated in a rescript that only those who serve the corn supply of the city have immunity for sea-going ships. 6. Although a man may be a member of the corporation of shipowners, yet if he does not possess a ship or ships and if all the things laid down in imperial *constitutiones* do not fit his case, he will not be able to avail himself of the dispensation granted to shipowners. And this was laid down by the deified brothers in a rescript in these words: "There were also other people who claimed to escape *munera* on the same grounds as shipowners and people supplying the market of the Roman people with corn and oil, who are immune, although they were not making voyages and did not have the greater part of their capital invested in maritime and mercantile business; such people are to be deprived of immunity." 7. In regard to dispensations it must be stated that if any one is called to undertake municipal *munera* before he begins in business, or before he enters a *collegium* which confers immunity, or before he reaches the age of seventy or before he publicly registers [his immunity] or before he has children whom he acknowledges, he should be compelled to hold the office. 8. Business activity is necessarily designed to increase a man's wealth. All the same, if a man applies the greater part of his money to business activity and yet after becoming rich has continued to employ no greater amount of money therein, he will be liable to *munera*, just like rich men who invest a modest sum in the purchase of ships and try to escape from public *munera*; and a letter of the deified Hadrian was written to the effect that this rule was to be followed. 9. The deified Pius also stated in a rescript that whenever any shipowner was being investigated it should be elicited whether he was putting on the show of being a shipowner for the purpose of escaping from *munera*. 10. Contractors who have leased the right to collect revenues of the imperial treasury are not bound by the necessity of undertaking municipal *munera*; and this rule was stated in a rescript of the deified brothers. It can be understood from this imperial rescript that the grant to contractors of exclusion from municipal *munera* was not made as an honor, but in order to prevent the diminution of their resources, which are pledged to the imperial treasury. Hence, the point can arise, whether a governor or procurator of Caesar should prevent them from actually volunteering to perform municipal *munera*; it is the better view that he should stop this, unless they are said to have balanced their accounts with the imperial treasury. 11. The *coloni* of Caesar are also freed from *munera*, so that they may be more suitable for the cultivation of the estates of the imperial treasury. 12. Immunity is granted to certain *collegia* or corporations to which the right of meeting has been given by law, namely to those *collegia* or corporations in which each member is enrolled on the basis of his craft such as the corporation of builders and any other which has the same reason for existence, that is to say, those instituted to provide services required for public needs. Nor is immunity given indiscriminately to every one enrolled in these *collegia*, but only to craftsmen. Nor can men of any age be adlected, as the deified Pius decided, in excluding men of advanced or very tender years. But it has been established in many ways that those who have increased their resources and are capable of supporting the *munera* of the communities can no more avail themselves of dispensations which were granted to poorer men who are divided among *collegia*. 13. I understand that those who have been adlected into corporations, which provide immunity, as that of shipowners, are to be compelled to support public *munera*, if they have accepted the office of the decurionate; and this view seems to have been confirmed by a rescript of the deified Pertinax.

7 (6) TARRUNTENUS PATERNUS, *Military Matters, book 1:* Their status grants some exemption from the more burdensome *munera* to some people, for instance, those who measure out [the corn], the assistants in a hospital, doctors, makers of satchels, and craftsmen who dig ditches, veterinary surgeons, architects, helmsmen, shipwrights, artillery manufacturers, mirrormakers, builders, archers, bronze-workers, makers of statues of bronze cows, wagonmakers, shinglers, gladiators, conduit-inspectors, conduitmakers, trumpetmakers, bowmakers, leadworkers, ironworkers, stonemasons, those who burn lime, those who cut wood, those who cut and prepare charcoal. In the same category are customarily placed butchers, hunters, *victimarii*, the assistants of a factory, those who serve the sick, also copyists who can teach and the secretaries of granaries, of depositories, and of controllers of estates without owners, also helpers of adjutants, grooms, undertakers, guards for armories, also a herald and a trumpeter. So all those are regarded as being immune.

7

EMBASSIES

1 ULPIAN, *Massurius Sabinus, book 8:* If a municipal ambassador abandons an embassy he will suffer a special penalty, as well as having been removed from the *ordo*, as usually happens.

2 ULPIAN, *Opinions, book 2:* An ambassador can ask the emperor for something through an intermediary against the interests of the community of which he is the ambassador. 1. A man must establish before the *ordo* of his *patria* whether he abandoned an embassy or suffered an unavoidable delay. 2. The failure of one ambassador does not incriminate a man who has performed the *munus* as he should.

3 (3) ULPIAN, *Opinions, book 2:* Appropriate expenses are to be repaid to those who have undertaken an embassy other than at their own expense.

4 (3) AFRICANUS, *Questions, book 3:* If the question arises whether an action should be granted against someone who is on an embassy, what is important is not so much where someone either made a loan or stipulated payment, but rather whether the procedure included a provision that payment should be made during an embassy.

5 (4) MARCIAN, *Institutions, book 12:* One must realize that a debtor cannot undertake an embassy for his community; and this is a purport of a rescript of the deified Pius to Claudius Saturninus and Faustinus. 1. But the deified Severus and Antoninus also issued a rescript to the effect that those who do not possess the right of postulating cannot undertake an embassy and that therefore an ex-gladiator sent as an ambassador was not correctly sent. 2. However, debtors to the imperial treasury are not barred from serving on embassies. 3. If someone be charged in a public prosecution, there is no obligation on the accuser to take on an embassy to one who declares himself a friend or relative of the person charged; and so said the deified brothers in a rescript to Aemilius Rufus. 4. Legates can give as substitutes no other than their own sons. 5. Everyone serves on an embassy in order [of rank]; and a man is not compellable to serve on an embassy unless those chosen above him in the *curia* have served. But if the embassy requires [other] more elevated persons and those sum-

moned be of a lower status, the order of rank has not to be observed; so ruled the deified Hadrian in a rescript to the Clazomenii. 6. An edict of the deified Vespasian, directed to all cities, ordained that no more than three be sent on an embassy.

6 (5) SCAEVOLA, *Rules, book 1:* A person sent on an embassy benefits by the time from when he was selected as such, not that of his arrival at Rome. 1. Should it be the case that there is disagreement whether or not he be a member of the embassy, the praetor at Rome will take cognizance of the issue.

7 (6) ULPIAN, *Duties of Proconsul, book 4:* That a son should be granted no exemption by reason of his father's service on an embassy was laid down by our emperor and his father in a rescript to Claudius Collatus, the words of which follow: "What you seek, that by reason of your father's being on an embassy, you should be exempt from similar service, is lawfully observed in the intervals between magistracies which involve expense. The case is different with embassies which are merely a matter of service."

8 (7) PAPINIAN, *Replies, book 1:* If a son who is a decurion has undertaken to serve on an embassy instead of his father, that fact does not release him from setting out as an ambassador when his turn comes; the father, however, can claim an exemption for two years, because he is regarded as having undertaken an embassy in the person of his son.

9 (8) PAUL, *Replies, book 1:* One replies to someone who has undertaken an embassy that it is not right for him to be forced to defend the public interest again within the time prescribed for exemption, even if the suit involves the same issue. 1. "The Emperors Antoninus and Severus Augusti to Germanus Silvanus. An exemption for two years is granted to those who have undertaken an embassy; nor does it make any difference whether the embassy has been sent to us in the city or in a province." 2. One replies that someone who is serving on an embassy must not involve himself in his own or anyone else's affairs; this provision does not seem also to cover someone who gives counsel to the praetor as a friend without fee.

10 (9) PAUL, *Replies, book 3:* Paul replies concerning the loss which an ambassador suffered during an embassy that he can even sue during the term of the embassy.

11 (10) PAUL, *Views, book 1:* An ambassador cannot do anything in relation to his own property before he has undertaken the actual embassy, except for things which relate to his injury or loss. 1. If someone dies during the *munus* of an embassy, before he returns to his *patria,* the expense allowance granted when he set out is not returnable.

12 (11) PAUL, *Law of Petitions, sole book:* If an embassy is imposed on someone in absence and he undertakes it at his own expense, he can also transact the business of the embassy by means of someone else. 1. Although someone who is undertaking an actual embassy cannot deal with his own business, nonetheless, Antoninus Magnus allowed him in the name of a female ward to mount or defend a case, even though he has not given up the embassy which he undertook, particularly if he said that he was made part of it in absence.

13 (12) SCAEVOLA, *Digest, book 1:* Someone appointed as an ambassador by his *patria* came to the city of Rome after undertaking the embassy and before it was completed bought a house which was situated in his own community of Nicopolis. The question arose whether his action fell within the terms of the decree of the senate by which ambassadors are debarred from devoting themselves to business or private affairs before the completion of the embassy. The reply was that it seems not to be covered.

14 (13) PAPINIAN, *Replies, book 1:* A replacement provided at his own volition for the *munus* of another will be forced to undertake an embassy when his turn comes without the admission of the two year interval.

15 (14) ULPIAN, *Praetor's Edict, book 74:* Someone who is absent on an embassy which allows him to do what he wishes is not regarded as being away on public business; for he is absent not to serve the public interest, but his own.

16 (15) MODESTINUS, *Rules, book 7:* Someone who is undertaking an embassy cannot present a petition about other affairs of his without the permission of the emperor.

17 (16) MODESTINUS, *Rules, book 8:* There is no bar on the same person undertaking several embassies especially if he proves that expense and journey time are reduced. 1. If a

business matter arises for someone before an embassy is undertaken, he ought to be defended even if he is absent; once an embassy is undertaken, he may not perform any task except a *munus* which is imposed on him.

18 (17) **POMPONIUS**, *Quintus Mucius, book 37:* If someone strikes an ambassador of the enemy, he is regarded as having acted against the law of nations, because ambassadors are regarded as sacred. And likewise if, when the ambassadors of some people were with us and war was declared against it and the reply was given that they were free to remain; for this befits the law of nations. So Quintus Mucius was accustomed to reply that someone who struck an ambassador was surrendered to the enemy whose ambassador he was. If the enemy did not accept him, the question arose whether he remained a Roman citizen. Some people thought that he did, some the opposite, because whomsoever the people had once ordered to be surrendered seemed to have been expelled from the state, as happened when someone was forbidden fire and water. Publius Mucius seems to have held this view. But the question arose most notably in the case of Hostilius Mancinus, whom the Numantines did not accept when he was surrendered to them; a law was later passed about him, however, making him a Roman citizen, and he is even said to have held the praetorship.

8

THE ADMINISTRATION OF PROPERTY BELONGING TO THE [PROVINCIAL] COMMUNITIES

1 **ULPIAN**, *Disputations, book 10:* Anything left to the particular use of a community cannot be converted to other uses.

2 **ULPIAN**, *Opinions, book 3:* It is by no means appropriate for the basis of earlier contracts of hire, which had their own formats, to be investigated starting from a later contract. 1. Anything which a man is debarred from doing in his own person he is also debarred from doing through a subordinate. And so if a decurion through intermediaries farms public property which cannot legally be rented by decurions, it is to be resumed as having been taken over illegally. 2. If anything has been converted to another use from the corn account, it is to be returned with the proper interest to its proper account. And even if this decision has been made against someone who is absent, any complaint is in vain. The basis of administration, however, is to be taken as being the trustworthiness of records, receipts, and expenses. 3. A debtor to the corn account is to settle as soon as possible from his own resources. For the corn account which is necessary to all communities must not suffer from delayed payment; but debtors may be forced to payment by the governor of the province if he has any in this position. 4. Money given for the purchase of corn must be restored to a community and not balanced by money spent on services to the community. But if money for corn has been converted to other uses than those, for which it was intended, as, for instance, the building of public baths, even if it can be shown that this was done in good faith, it is not right for the amount to be credited as far as the corn account is concerned, but the *curator rei publicae* will order the actual amount to be paid. 5. If settlement of a debt to the corn account is made with interest, the limit to excessive and illegal computation, namely on compound interest, is not applied. 6. The *curator rei publicae* may order restitution to be made to an owner of the value of grain removed wrongfully after a purchase which is made for the public account. 7. If someone who was suitable at the time when he was nominated later suffers a decline in wealth and causes loss to the community because of his debts, because no human counsel can foresee chance disasters, the man who nominated him is not obliged to pay anything under this head. 8. The law of a community cannot be altered by an agreement for the magistrates to be less liable even on behalf of a colleague under those heads where liability is legally possible. 9. But an action which is usually decided on under these heads against a colleague falls in equity to the man who spends on behalf of someone else. 10. Whatever is shown to have been spent by a magistrate on

behalf of a colleague, the governor of the province will order to be paid by his heirs.

3 (2, 11) ULPIAN, *Opinions, book 3:* After the contractor for the completion of a job had been punished, the verbal guarantor who had stood surety for him had contracted out the completion of the same building to someone else; and when the building was not completed by the second contractor, the heir of the verbal guarantor must not refuse to pay the interest on the money involved, since even the first case bound the verbal guarantor completely in a contract of good faith and the later contract, because he accepted that he was at risk, involved him in complete settlement to the community. 1(12). Those who acted as verbal guarantors for the collector of tax for the entire contract are rightly liable also for the interest, unless there is some explicit provision in the terms of the obligation in their case. 2(13). But if in the renting out of property there is in the agreement some provision for a season of blight in relation to the making of payment for each year, at the discretion of an upright arbitrator, good faith is to be observed once the terms of the contract have been investigated.

4 (3) PAPINIAN, *Replies, book 1:* The administrators of a shared task, once the sum has been shared out which it was agreed that they should all give as a whole to the community, are not freed of risk on behalf of each other. ULPIAN: The first person liable, on the analogy of a tutor, is the man who undertook the task.

5 (3, 1) PAPINIAN, *Replies, book 1:* A *curator rei publicae* rented out public land for five years without extracting suitable surety and levied from the tenant the rent for his term of office. If for the remaining period the tenant delayed paying what remained and the rent could not be got even from the produce of the land, the successor and not the curator who let the land out will be liable. The same provision was not originally enforced in this way in the collection of taxes, namely that everyone should bear the risk for their term of office. 1(2). It is not right for an action to be denied after the end of his term against a man who in the period of his administration by making a novation provided surety for a sum to creditors of the community. The position of someone who established that settlement was being made is different; for he seems to be in the position of someone who sold or let out something on behalf of the community. 2(3). A son must not be forced to provide surety for his father when he has been made *curator rei publicae*; nor does it make any difference if his father transferred some of his property to him as a gift after he [the son] had been emancipated and before he [the father] was made curator. 3(4). A verbal guarantor when asked in connection with a magistracy actually gave pledges specially; the pledges are regarded as given for those circumstances in which action is rightly taken, namely after the man on whose behalf he acted was unable to manage the affair.

6 (4) VALENS, *Fideicommissa, book 2:* It is not lawful to convert money left to a municipality for any purpose other than that designated by the deceased without the authority of the emperor. And so if he instructed one building to be erected which cannot be done because of the provisions of the *lex Falcidia*, it is possible to convert the sum which becomes available as a result to the purpose which seems most necessary to the community. If several sums are left for several buildings and because of the provisions of the *lex Falcidia* what is left is not sufficient for the construction of all the buildings, it is possible for the money to be spent on one building which the community desires. But the senate has forbidden money left to a municipality so that wild-beast shows and games may be given from income thereon to be spent on those purposes. And it is possible for money left for whatever seems most necessary to the *municipes* to be spent in any way such that the munificence of the testator is noted in the inscription on it.

7 (5) PAUL, *Views, book 1:* Decurions may not be forced to provide corn at a price cheaper than the price of corn at the time in their *patria*. Unless money is left specifically for new building, it is to be used for repairing an existing building.

8 (6) ULPIAN, *Praetor's Edict, book 1:* The magistrates of a community must not only [avoid] bad faith and clear negligence but also must furthermore [display] diligence.

9 (7) PAUL, *Praetor's Edict, book 1:* If a son-in-power holds a magistracy at his father's wish, Julian held that the father was liable for the whole of the loss suffered by a community because of him.

10 (8) MODESTINUS, *Rules, book 8:* The reversal of an error in accounting will be accepted even after ten or twenty years. But if the accounts are said to have been reckoned up corruptly, they will not be accepted [as being in error].

11 (9) PAPIRIUS JUSTUS, *Constitutiones, book 2:* The Emperors Antoninus and Verus issued a rescript to the effect that interest was to be exacted on money which remained with curators. However, the risk arising from the capital which cannot be recovered from the contractors for buildings belongs to curators. Likewise, they issued a rescript to the effect that this risk belongs also to the heirs of curators. 1. They likewise issued a rescript to the effect that the curator of a community ought to recover the land of a community, even if it is held by purchasers in good faith when they can have recourse against the vendors concerned.

12 (9, 3) PAPIRIUS JUSTUS, *Constitutiones, book 2:* The Emperors Antoninus and Verus issued a rescript to the effect that the exaction of services is not to be done without surety. 1(4). They likewise issued a rescript to the effect that curators are liable for the sum in question if they behaved negligently in dividing up property, for double if fraudulently; and the penalty did not descend to their heirs. 2(5). Likewise, that a curator must exact money intended for the corn supply if property has been divided up. 3(6). Likewise, that *sitonai* who have not been dilatory in the execution of their duty, must not suffer loss, as laid down in a letter of Hadrian. 4(7). Likewise, that surety must not be extracted from the curator of an archive when he is chosen by the governor after an investigation. 5(8). Likewise, that a curator is also liable on account of his colleague if he was in a position to intervene and block him. 6(9). Likewise, that in the case of headings whose position has worsened during the term of a curator, the risk is his; but in the case of things which were not as they should be before he became curator it was reasonable to hold that the risk was not his.

13 (9, 10) PAPIRIUS JUSTUS, *Constitutiones, book 2:* The Emperors Antoninus and Verus issued a rescript to the effect that someone who had held public money during his magistracy and for some time after ought to provide interest, unless he could produce some reason for having paid it in late.

9

DECREES MADE BY AN *ORDO*

1 ULPIAN, *Opinions, book 3:* The decision on the doctors to be included within a prescribed number is not entrusted to the governor of a province but to the *ordo* and the landholders of each community, so that they themselves, being certain about their uprightness and skill, may choose men to whom they may entrust themselves and their children when ill.

2 MARCIAN, *Public Affairs, book 1:* Those decrees which are made when the proper number of decurions is not present are not valid.

3 ULPIAN, *Appeals, book 3:* It is, however, laid down in the *lex municipalis* that the *ordo* may not meet except when two thirds are present.

4 ULPIAN, *Duties of Curator Rei Publicae, sole book:* Decrees of decurions which favor individuals are to be rescinded, whether they let off some debtor or give money away. 1. Also as happens, if they have granted from the public domain an estate or a house or something to someone, a decree of this kind will not be valid. 2. But also if the decurions have decreed a salary to someone, this decree will sometimes be of some

effect, for instance, if a salary was [already] established for a liberal art or for medicine; for salaries may be established for these reasons.

5 CALLISTRATUS, *Judicial Examinations, book 2:* The deified Hadrian issued a rescript to the Nicomedians to the effect that what the *ordo* had once decreed must not be repealed except for cause, that is, if the repeal of the earlier decree relates to the public good.

6 SCAEVOLA, *Digest, book 1:* It was laid down in the *lex municipalis* that if anyone judges outside the *curia*, he is to be removed from the *curia* and is to pay in addition a fine of a thousand drachmae. The question arises whether he should suffer the penalty if he acted against the decree in ignorance. One replies that penalties of this particular kind are designed for those who know what they are doing.

10

PUBLIC WORKS

1 ULPIAN, *Opinions, book 2:* Someone appointed as a curator of works and prevented by prescription from the implementation of release, while he leaves his heirs bound under the heading of noncompletion, to which he was subject as long as he lived, does not subject them to any burden which relates to the period falling after his death. 1. Someone had later undertaken the care of building an aqueduct although already involved in another *munus*. It seemed unreasonable of him to ask to be relieved of the earlier [*munus*] when involved in them both, when, if it had been right for him to bear only one, he would previously have been likely to gain release from the later [*munus*] on the grounds of the first *munus*.

2 ULPIAN, *Opinions, book 3:* Someone who gave his income for the time being toward the completion of public works from liberality and not because of the constraint of a debt is not to be prevented by envy from enjoying the fruit of his munificence in the form of the inscription of his name on the buildings. 1. However, the curators of works deal with the contractors, the community, with those whom it put in charge of completing the work. Therefore, how far anyone is bound, who is bound, and to whom lie within the discretion of the governor of the province. 2. The governor of the province must use his authority to prevent the erasure of the name of the man by whose liberality a building was erected and the substitution of other names and as a result the withdrawal of similar gifts by citizens to their *patriae*.

3 MACER, *Duties of Proconsul, book 2:* A private individual may undertake a new project even without the permission of the emperor, except if it is to outdo another citizen or causes sedition or is a circus, theater, or amphitheater. 1. But it is laid down in *constitutiones* that a new project at public expense cannot be undertaken without the permission of the emperor. 2. And it is not lawful for any other name to be inscribed on a public building than that of the emperor or of the man by whose money it was built.

4 MODESTINUS, *Encyclopaedia, book 11:* Nor will it be lawful to add the name of the governor.

5 ULPIAN, *Duties of Curator Rei Publicae, sole book:* In the case of a legacy or a *fideicommissum* left for a building, a rescript of the deified Pius thus prescribes what interest is owed and when: "If, indeed, the day is not prescribed by the men who left the legacies for the erection of statues or images, the time is to be fixed by the governor of the province. And unless the heirs erect [the statues or images], they must pay the community moderate interest for six months, otherwise six percent. But if a day is prescribed, they must put the money down before that day, if they claim not to be able to get the statues or are engaged in controversy over the position; otherwise, they must pay six percent at once." 1. It is not right for public property to be held by private individuals. So the governor of the province will take care to separate what-

ever is public property from private and thus increase public revenue; if he finds any public places or buildings passed to private use, he will calculate whether they are to be claimed as public property or whether it is better to impose a rent on them, and he will carry out whatever he reckons to be better for the community.

6 MODESTINUS, *Encyclopaedia, book 11:* The deified Marcus issued a rescript to the effect that if a governor was approached about public works which related to walls or gates or public harbors or if walls were being built, he must consult he emperor.

7 CALLISTRATUS, *Judicial Examinations, book 2:* The deified Pius issued a rescript to the effect that money bequeathed for new building was rather to be converted to the upkeep of those which already existed than spent on beginning a building, that is, if a community had enough buildings and money was not easily found for their repair. 1. If someone undertook to decorate a building erected by someone else with marble or to do it in some other way according to the will of the people, with his name to be included in the inscription and the inscriptions to remain of the earlier benefactors who had erected the building, the senate decreed that the project should go ahead. And if private individuals add some money from their own resources for buildings which are being erected from public funds, it is laid down in the same mandates that they should organize the inscription in such a way as to record the sum which they had contributed for the building.

11

MARKETS

1 MODESTINUS, *Rules, book 3:* By not using for a period of ten years the right to hold a market granted by the emperor the man who acquired the right loses it.

2 CALLISTRATUS, *Judicial Examinations, book 3:* If the actual farmers or fishermen have been ordered to bring things into a city to sell them themselves, the supply of corn will be interrupted when the country people leave their work; they ought, as soon as they have brought their wares in, to hand them over and return to their work. Indeed, when Plato, a man of the highest reputation among the Greeks for good sense, was laying down how a state could be well and happily run, he regarded the tradesmen as particularly necessary. For in the second book of the *Republic* he says: "One will need then a number of farmers and other workers and other people whose function is to import and export things. These will be called traders. And when a farmer or any other worker has brought any of his produce to market, if he does not come at the same time as those who need to acquire things from him, will he sit in the market abandoning his work? 'Certainly not,' he said, 'but there are people who realize this and provide themselves for this service.'"

12

UNDERTAKINGS

1 ULPIAN, *Duties of Curator Rei Publicae, sole book:* If someone has undertaken to build something for a community or to give money, he will not be liable for interest; but if he starts to delay, interest will accrue, as is laid down in a rescript of our emperor with his deified father. 1. But it must be realized that someone who has made an undertaking is not always bound. If a man has promised something in return for an office already granted to him or to be granted or for any other proper reason, he will be bound by his undertaking; but if he has promised for no reason, he will not be

bound. And this provision occurs in many *constitutiones* both old and new. 2. Likewise, if someone promised for no reason but began to carry out his promise, he is bound. 3. We regard a beginning as the laying of the foundations or the clearing of the site. And, indeed, if a site is designated at his request, it looks more as if he has begun. Likewise, if he has deposited equipment or money in public hands. 4. And, indeed, even if he has not begun himself, but if he had promised a certain sum for a building and the community in expectation of this sum had begun to build, he is bound on the grounds that the work is as it were begun. 5. Finally, when someone had promised some columns, our emperor with his deified father issued a rescript in these terms: "Those who promise money to a community for no reason are not compelled to carry their liberality through. But if you promised columns to the people of Citium and on that basis the work has been begun at the expense of the community or of private individuals, it is not right for something which has been undertaken to be abandoned." 6. If someone has assigned [to the community] a building which he has completed and thereafter by chance it suffers some damage, the responsibility does not lie with the man who built the building according to a rescript of our emperor.

2 ULPIAN, *Disputations, book 1:* If someone has vowed to dedicate something, he is bound by his vow. This binds the person who makes the vow not the object which is vowed. For when the thing which is vowed is dedicated, it releases the man from the vows, but is not itself made sacred. 1. But heads of a family who are mature are bound by a vow; for a son-in-power or a slave is not bound by a vow without the authority of father or master. 2. If someone has vowed a tithe of his property, the tithe does not cease to be part of his property until it has been detached. And if it happens that a man who has vowed a tithe dies before he has detached it, his heir as heir is bound to pay the tithe. For it is agreed that the obligation of a vow is transferred to the heir.

3 ULPIAN, *Disputations, book 4:* A pact is an agreement and convention of two people, but an undertaking is the promise only of the person who makes it; and so it is established that if an undertaking has been made on account of an office, it is to be fulfilled as if it were a debt. And, moreover, a building once begun, even if it was not promised on account of an office, must be completed by the man who promised it and this is what is established. 1. If anyone wishes to claim back from his *municipes* something which he had handed over as a result of an undertaking, his petition is to be rejected; for it is fairest if intentions of this kind once evinced toward communities are not abandoned as a result of second thoughts. And even if the *municipes* have ceased to hold something, one must say that an action is to be granted to them.

4 MARCIAN, *Institutes, book 3:* If anyone has promised anything because of a fire or an earthquake or any disaster which has happened to a community, he is bound.

5 ULPIAN, *Replies, book 1:* Reply is made to Charidemus that someone cannot be compelled to perform as a result of a letter which he sent in absence in order to proffer a *munus*.

6 ULPIAN, *Duties of Proconsul, book 5:* The reduction of an undertaking in the person of an heir takes place whenever the undertaking was not made on account of an office. But if it was made on account of an office, it is regarded as equivalent to a debt and is not reduced in the person of the heirs. 1. If anyone has promised money not on account of an office and has begun to pay, our Emperor Antoninus issued a rescript to the effect that he must pay as in the case of a building which has been begun. 2. One must realize that not only men but also women must fulfill an undertaking if they have made it on account of an office; and this is what is contained in a rescript of our emperor and his deified father. 3. If a community has imposed on anyone the necessity of erecting statues of the emperor, if he has not promised to do so, there is no obligation on him to obey, as is laid down in rescripts of our emperor and his deified father.

7 PAUL, *Duties of Proconsul, book 1:* If someone has promised to do something because of a disaster which a community has suffered, even if he has not begun to do it, he is completely bound, as the deified Severus said in a rescript to Dio.

8 ULPIAN, *Duties of Consul, book 3:* The deified brothers issued a rescript to Flavius Celsus to the effect that there was a judicial examination by judges about undertakings made to a community in these words: "Statius Ruffinus will behave correctly if he completes the building of the proscaenium which he promised the people of Gabil that he would build and which he has at least begun. For even if he has had the ill fortune to be exiled by the prefect of the city for three years, he should not diminish the favor involved in the public building which he offered of his own free will, since even in absence he can complete the building with a friend or intermediary. And if he declines, appointed agents, who can legally act on behalf of the community will be able to approach judges in prosecution of him on the public behalf; these judges, as soon as possible, will hear the case before he sets off for exile and if they establish that the work ought to be completed by him they will order him to obey the community in this case or they will forbid the sale of the farm which he has in the territory of the Gabines."

9 MODESTINUS, *Distinctions, book 4:* An individual is completely bound for the entire sum by an undertaking which he has made in a community on account of an office; and his heir is bound for the entire sum by a promise made on account of an office; but in the case of a building which has been promised and begun, if the property is insufficient to fulfill the liberality, an heir outside the family is bound up to a fifth of the patrimony of the dead man, children up to a tenth—all this according to a rescript of the deified Severus and Antoninus. And further the deified Pius established that if the donor himself was reduced to poverty he owed the fifth part of his patrimony as a result of a promise of a building which had been begun.

10 MODESTINUS, *Replies, book 1:* Septicia promised a show to her community by promising on condition that the capital remained with her and she herself paid six percent interest for the prizes of the contestants in these words: "I undertake and consecrate a four-yearly contest with a capital of thirty thousand denarii, myself holding the money which forms the capital and depositing with the *decaproti* sufficient surety for my paying the usual interest on thirty thousand denarii with my husband as master of ceremonies and president and thereafter my children. And the interest will go to the prizes of the artists as the council decides for each contest." The question arises whether the sons of Septicia can suffer the injury of being deprived of the presidency of the contest according to the terms and condition of the undertaking. Herennius Modestinus replies that if the establishment of the contest was lawful, the form of the undertaking is to be preserved.

11 MODESTINUS, *Encyclopaedia, book 9:* If someone has promised money on account of an office or priesthood and dies before he takes up the office or magistracy, it is laid down in imperial *constitutiones* that his heirs should not be pursued for the money which he had promised for the honor or magistracy unless by chance the building was begun by him or by the community while he was alive.

12 MODESTINUS, *Encyclopaedia, book 11:* We cannot place statues to others in private buildings against the will of those who erected them, as is contained in a rescript of the deified Severus. If someone promised a building in order not to hold office, the deified Antoninus issued a rescript to the effect that he was to be forced to hold office rather than erect the building.

13 PAPIRIUS JUSTUS, *Constitutiones, book 2:* The Emperors Antoninus and Verus issued a rescript to the effect that those who promised buildings on account of an office must build them and not be forced to contribute money instead. 1. Likewise, they issued a rescript to the effect that conditions imposed on gifts made to a community are only valid if it is for the public good; and if they are damaging, they must not be observed. And so it is not right to observe the provision of the deceased that if a certain sum was left tax was not to be levied. For those things are tolerable, which are hallowed by ancient custom.

14 POMPONIUS, *Letters and Various Readings, book 6:* If someone has promised on account of his own or another's office that he would erect a building in some community, he and his heir are equally bound to complete the building, according to a *constitutio* of the deified Trajan. But if someone has promised to erect a building in some commu-

nity not on account of an office and has begun it and has died before completing it, an heir from outside the family must either complete it or if he prefers give a fifth part of the patrimony left him by the man who had begun to erect the building to the community in which the erection of the building was going on; but he who is among the sons, if he is an heir, is bound to contribute not a fifth part but a tenth. This is what the deified Antoninus established.

15 ULPIAN, *Duties of Curator Rei Publicae, sole book:* The deified Pius issued a rescript to the effect that among the sons is included the grandson born from a daughter.

13

VARIOUS AND EXTRAORDINARY JUDICIAL EXAMINATIONS AND IF A JUDGE IS SAID TO HAVE NEGLECTED HIS DUTY

1 ULPIAN, *All Seats of Judgment, book 8:* The governor of a province regularly settles the law on salaries, but only for the teachers of the liberal pursuits. We regard as liberal pursuits those which the Greeks call *eleutheria.* Rhetors will be included, grammarians, geometricians. 1. The claim of doctors is the same as that of teachers, perhaps even better, since they take care of men's health, teachers of their pursuits. And as a result in their case also judicial hearings must take place outside the regular system. 2. And let governors also hear cases involving obstetricians, who seem to practice a sort of medicine. 3. Some will perhaps regard as doctors those also who offer a cure for a particular part of the body or a particular ill, as, for instance, an ear doctor, a throat doctor, or a dentist. But one must not include people who make incantations or imprecations or, to use the common expression of impostors, exorcisms. For these are not branches of medicine, even though people exist who forcibly assert that such people have helped them. 4. But are philosophers also to be included among teachers? I should not think so, not because the subject is not hallowed, but because they ought above all to claim to spurn mercenary activity. 5. Likewise, governors should not hear cases involving teachers of civil law; knowledge of civil law is indeed a most hallowed thing, but something which is not to be valued in terms of money or dishonored by seeking in court a fee which should have been offered voluntarily when someone began to follow such a calling. 6. Although also masters of an elementary school are not teachers, nonetheless, the custom has arisen that cases involving them should be heard, also those involving archivists and shorthand writers and accountants or ledgerkeepers. 7. But the governor of a province must not hear outside the regular system cases of workers or craftsmen in fields other than those involving writing or shorthand. 8. And if assistants ask for a salary, they are in the same position as is established for teachers. 9. And the governor must take cognizance of all such claims, since the deified brothers issued a rescript to the effect that they might be proceeded against as one proceeds against advocates. 10. As regards the fees for advocates, the judge must proceed in such a way that he sets the level in relation to the nature of the case and the skill of the advocate and the custom of the circuit and the court in which the advocate was to plead, provided the amount does not exceed the legal fee; for this is the provision of a rescript of our emperor and his father. The words of the rescript are as follows: "If Julius Maternus, whom you wished to be the advocate in your case is prepared to take the case which was entrusted to him, you may reclaim only the amount of money which exceeds the legal limit." 11. We must regard as advocates all those at any rate who work on pleading cases with a certain degree of application; but those who regularly receive remuneration for drafting a case without being present at the hearings will not be regarded as advocates. 12. If surety has been provided to someone for a fee or if anyone has made a pact over a suit, we must consider whether he can claim. And, indeed, there is a rescript about pacts by our emperor and his deified father in these terms: "You yourself admit that money was wrongly promised to you for a suit. But this applies if a surety promises a share in a future emolument if the

suit is suspended. But if the fee is promised with a surety after the case is heard, it can be claimed up to the amount which can be proved, even if the caution is under the heading of a fee for a successful advocate; on this basis, however, namely that what has been paid is reckoned with what is owed and no total exceeds the lawful amount." The lawful amount for each case is regarded as being up to a hundred aurei. 13. The deified Severus forbade a fee to be claimed back from the heirs of an advocate after his death, because it was not his fault that he did not plead the case. 14. The duties of a governor or praetor relate also to nursing; for nurses claim what is owed to them for nursing children from governors. But we regard nursing as lasting as long as infants are breast-fed; after this the role of the governor or praetor ends. 15. If all these claims are made before governors, we must consider whether governors can take cognizance about claims over loans for consumption. And I should think that they must be admitted.

2 ULPIAN, *Opinions, book 1:* Reply has been made that the governor of a province must be informed about taking of water, about new channels made illegally, about horses wittingly possessed by someone other than their owner and their offspring, and about loss caused by the admission on to the estate of someone of all the men [transhuman shepherds] who should have been distributed over the estates of several, provided this was done without the permission of someone entitled to give orders in order that he may provide a proper framework for the case according to the nature of the case and the order of jurisdiction.

3 ULPIAN, *Opinions, book 5:* If a doctor to whom someone with bad eyes entrusted their treatment, by raising the danger of losing them as a result of harmful medicaments, forced the man while sick to sell his possessions to him contrary to good faith, the governor of the province is to block the illegal act and order restitution to be made.

4 PAUL, *Plautius, book 4:* The deified Antoninus Pius issued a rescript to the effect that those learned in the law who claimed salaries could exact them.

5 CALLISTRATUS, *Judicial Examinations, book 1:* The number of judicial examinations, since it arises from various causes, cannot easily be divided into categories, unless this is done schematically. But the number of judicial examinations can perhaps be divided into four categories; for it is either a question of the undertaking of offices and *munera*, or of property, or of someone's status, or of a capital offense. 1. Status is a position of unimpaired standing, which is established by law and custom and under the authority of the laws may be reduced or removed by our delict. 2. Status is reduced if we are assigned a penalty which affects our standing, although liberty remains, as, for instance, if someone is banished or removed from the *ordo* or debarred from holding public office or if a plebeian is beaten with rods or assigned to forced labor or if anyone falls under any heading which is listed in the perpetual edict as bringing infamy. 3. Status is removed if *magna capitis minutio* occurs, that is, if deprivation of liberty occurs, as, for instance, if someone is forbidden fire and water, which occurs when he is deported or if a plebeian is assigned to mine work or to a mine; for it makes no difference, nor is there any distinction between a public work and a mine, except that those who escape from a public work are punished not by death, but by assignment to a mine.

6 GAIUS, *Common Matters or Golden Words, book 3:* If a judge has heard his own case, he does not seem to be strictly speaking bound because of delictal activity; but because he is not bound under the law of contract and yet has clearly done something wrong, even if by inadvertence, as a result he seems to be bound as it were because of delictal activity by an action arising out of the act and will pay a penalty for as much as seems right in the affair in the conscientious judgment of the judge.

14

SLAVE-TRADING MATTERS

1 ULPIAN, *Sabinus, book 42:* Cases of slave-trading are prosecuted rightfully by law.

2 ULPIAN, *Edict, book 31:* If a slave-trader has become a surety in the recording of a debt, as many of them do, we must see if he can be held liable as a mandator. And I think that he cannot be held, since he rather indicates than mandates the debt, although he approves it. I hold the same view even if he has accepted something as an act of charity; nor will there be an action on hire. Clearly, if he has got the better of a creditor by clever deceit, he will be subject to an action for deceit.

3 ULPIAN, *All Seats of Judgment, book 8:* Governors usually hear cases concerning slave-trading, although it is demeaning, but in such a way that in these affairs also there is a limit both to the amount at stake and to the affair in which they performed their small service or provided some assistance. It is more difficult for what the Greeks call *hermeneutikon* to be the subject of an action before them, if perchance a slave-trader was in a position of friendship or assessorship or something else of that kind; for there are functions for this kind of man, as one would expect in so large a state. For there is a kind of slave-trader who is useful in a not unreasonable way in sale and purchase and *commercia* and lawful contracts.

15

CENSUSES

1 ULPIAN, *Censuses, book 1:* One must realize that there are some colonies with *jus Italicum,* as in Syria Phoenice, the most splendid colony of the Tyrians, which is my place of origin, outstanding in its territories, of very ancient foundation, powerful in war, always loyal to the treaty it made with the Romans; for the deified Severus and our emperor granted it *jus Italicum* because of its great and conspicuous faithfulness toward the Roman state and empire. 1. But the colony of Berytus also in the same province was raised up by favor of Augustus and is, as the deified Hadrian says in a speech, an Augustan colony which possesses *jus Italicum.* 2. There is also the colony of Heliopolis, which received from the deified Severus on the occasion of civil war the status of an Italian colony. 3. There is also the colony of Laodicea in Syria Coele to which the deified Severus granted *jus Italicum* because of its services in civil war. For the colony of Ptolemais, which lies between Phoenice and Palestine, has nothing but the name of colony. 4. But our emperor also gave the status of colony to the community of Emisa in Phoenice and conferred the *jus Italicum* on it. 5. There is also the community of Palmyra in the province of Phoenice, sited near the peoples and nations of the barbarians. 6. In Palestine there were two colonies, Caesarea and Aelia Capitolina, but neither has the *jus Italicum.* 7. The deified Severus also founded a colony in the community of Sebaste. 8. In Dacia also the colony of Zerna was founded by the deified Trajan with the *jus Italicum.* 9. Zarmizegetusa also has the same status. Likewise, the colonies of Napoca and Apulum and the village of Patavissa [Potaissa]

which successfully petitioned the deified Severus for the status of colony. 10. And in Bithynia there is Apamea and in Pontus Sinope. And in Cilicia there is Selinus also known as Traianopolis.

2 ULPIAN, *Sabinus, book 28:* The flaws in earlier censuses disappear when the new lists are compiled.

3 ULPIAN, *Censuses, book 2:* It is necessary to indicate age in compiling censuses, because age confers on some people nonpayment of tax; for instance, in the provinces of Syria men are bound to pay poll-tax from fourteen, women from twelve, in both cases up to sixty-five. The relevant age is that at the time of the census. 1. It is rightly laid down in a rescript of our emperor to Pelignianus that immunity conferred on objects must not lapse; for immunity granted to persons dies with them, that granted to things never lapses.

4 ULPIAN, *Censuses, book 3:* It is laid down in the list of rules for the census that land must be entered in the census in this way: the name of each property, the community, and the *pagus* to which it belongs, its nearest two neighbors; then, how many *jugera* of land have been sown for the last ten years, how many vines vineyards have, how many *jugera* are olive-plantations and with how many trees, how many *jugera* of land have been used for hay for the last ten years, how many *jugera* of pasture there are, likewise of wood for felling. The man who declares anything must value it. 1. A census-taker should respect equity in that it is appropriate to his office for a man to be relieved who for particular reasons is unable to enjoy the extent of land declared in public records. So if part of his land has been lost in an abyss, he should be relieved by the census-taker. If his vines are dead or his trees have died of drought, it is unjust for their number to be listed in the census; but if he has cut down trees or vines, nonetheless, he is commanded to declare their number as it was at the time of the census, unless he has shown good reason for cutting them down to the census-taker. 2. A man who possesses land in another community must declare it in the community in which it is situated. For land tax must relieve that community in whose territory it is owned. 3. Although in some cases favors of immunity granted to persons are extinguished with their death, nonetheless, in general, immunity is regarded as granted to places or communities in such a way that it is transmitted to succeeding generations. 4. If, since I owned a farm, I declared it, but a man who claimed ownership did not declare it, it is right that his claim should remain. 5. In declaring slaves, one must see that their nationalities and ages and functions and skills are separately declared. 6. A proprietor must also declare for the census lakes with fish and harbors. 7. If estates possess saltpans, they too must be declared for the census. 8. If anyone has not declared a *colonus* or *inquilinus*, he will be liable to the penalties relative to the census. 9. Things born or acquired after the compilation of the census may be added to the declarations within the period when the census is going on. 10. If anyone has asked leave to be allowed to correct the census and then realized after he has been granted this that he need not have asked, because the matter did not require correction, rescripts have very often been issued to the effect that no prejudice will attach to him because he asked to correct the census.

5 PAPINIAN, *Replies, book 19:* If in order to expedite the affair a single owner is prosecuted under the law of taxation, the man who is prosecuted is allowed by the imperial treasury actions against the others whose estates are equally liable, of course, so that all may contribute the tax money according to the size of their estates. Nor are the actions allowed to no purpose, although the imperial treasury has recovered its money, since the sum is regarded as received from the debts of sellers. 1. Those who restore

estates as a result of a *fideicommissum* without taking account of taxation have an action under the ruling of the deified Pius Antoninus, an action which he wished to be available even when a legacy had been paid. 2. The offer of a monetary surety to prevent an estate being seized as a pledge is not allowed in the case of tax money which has not been paid on the due day; nor will a hearing be accorded to a legatee making a contrary claim over tax in arrears on the grounds that the heir is paying along with the man who was placed in charge of receiving tax.

6 CELSUS, *Digest, book 25:* The colony of Philippi possesses *jus Italicum.*

7 GAIUS, *Lex Julia et Papia, book 6:* Troas, Berytus, and Dyrrachium possess *jus Italicum.*

8 PAUL, *Censuses, book 2:* In Lusitania the Pacenses and Emeritenses possess *jus Italicum.* The Valentini and Ilicitani have the same status. The Barcinonenses there are also immune. 1. The Lugdunenses in Gaul and likewise the Viennenses in Narbonensis possess *jus Italicum.* 2. In lower Germany the Agrippinenses possess *jus Italicum.* 3. Laodicea in Syria and Berytus in Phoenice possess *jus Italicum,* and also their territory. 4. The city of Tyre was made of the same status by the deified Severus and Antoninus. 5. The deified Antoninus made Antioch a colony, reserving the right of taxation. 6. Our Emperor Antoninus made the city of Emesa a colony possessed of *jus Italicum.* 7. The deified Vespasian made Caesarea a colony without adding that they should possess *jus Italicum,* but he remitted the poll-tax there; and the deified Titus then interpreted the ruling to mean that their territory had also been made immune. The Capitolienses seem to be in the same position. 8. In the province of Macedonia, the Dyrracheni, Cassandrenses, Phillippenses, Dienses, and Stobenses possess *jus Italicum.* 9. In the province of Asia, there are two communities with *jus Italicum,* Troas and Parium. 10. In Pisidia, the colony of Antioch possesses the same status. 11. In Africa, Carthage, Utica, and Leptis Magna were granted *jus Italicum* by the deified Severus and Antoninus.

16

THE MEANING OF EXPRESSIONS

1 ULPIAN, *Edict, book 1:* This expression "if anyone" covers both men and women.

2 PAUL, *Edict, book 1:* The designation "city" relates to the area within the walls; the designation "Rome," however, includes also the adjoining buildings which is a larger area. 1. "The greater part of each day" is the first seven hours of the day not the last.

3 ULPIAN, *Edict, book 2:* "Twenty miles a day are to be covered in the course of the journey" is to be understood in such a way that if, after this computation, less than twenty miles remain, they may occupy a whole day. Thus, if there are twenty-one miles, two days are allotted to them. This computation is of course only to be done if there is no agreement about the day. 1. It is not possible to talk about the inheritance of someone who died in enemy hands since he died a slave.

4 PAUL, *Edict, book 1:* Proculus says that by the designation "name" the thing is meant.

5 PAUL, *Edict, book 2:* The designation "thing" is wider than "money" because it contains things which are outside the sum of our patrimony, while the meaning of money relates to those things that form part of our patrimony. 1. By hire of *opus* Labeo says that by these words is meant that *opus* which the Greeks call *apotelesma* not that which they call *ergon*, that is, some completed product of an executed *opus*.

6 ULPIAN, *Edict, book 3:* The designation "name" and "thing" relates to every contract and obligation. 1. The expression "according to the law" is to be understood as referring to intention of the laws as well as to their express statements.

7 PAUL, *Edict, book 2:* "*Sponsio*" designates not only something which results from a request for *sponsus* but every stipulation or promise.

8 PAUL, *Edict, book 3:* The expression "it will be necessary" covers both the present and the future. 1. No defense is included in the word "action."

9 ULPIAN, *Edict, book 5:* Marcellus as reported by Julian remarks that by the word "destroyed," cut up, broken, and forcibly abstracted are meant.

10 ULPIAN, *Edict, book 6:* It is agreed that by "creditors" are understood those who are owed anything as a result of any action or process either under the civil law, without any allowance for permanent exceptions, or under imperial enactment or under any extraordinary enactment, whether at once or after a delay or with some condition attached. But if the thing be due by natural obligation, they are not in the position of creditors. But if money on loan is not involved, but a contract, creditors are accepted.

11 GAIUS, *Provincial Edict, book 1:* Under the designation "creditors," there are understood not only those who have lent money but everyone to whom something is owed for whatever reason,

12 ULPIAN, *Edict, book 6:* for instance, if anyone is owed something as a result of sale or hire or for any other reason. But also if something is owed as a result of a delict, it seems to me that he can be regarded as being in the position of a creditor. But if it is a *causa popularis*, the person will be correctly stated as not being in the position of a creditor before the hearing of the suit but only after. 1. He who pays late pays less; for less is paid after a time.

13 ULPIAN, *Edict, book 7:* In the designation "woman" a virgin ready for a husband is also included. 1. Things are regarded as "missing" (as Sabinus says and Pedius approves) even if their substance remains but their form is changed; and likewise if they are given back ruined or transformed, they are regarded as missing, because for the most part there is more in the value than in the thing itself. 2. A thing is regarded, however, as "ceasing to be missing" when it returns into our control in such a way that we cannot lose possession of it. 3. Therefore, something which has earlier been stolen is missing and also something which is not under human control.

14 PAUL, *Edict, book 7:* Labeo and Sabinus think that if a piece of clothing is returned torn or something is given back ruined, such as goblets which have been crushed or a picture with the design removed, the thing is regarded as being "missing" because the value of those things does not lie in their content but in their workmanship. Likewise, if an owner in ignorance bought something which had been stolen from him, it is rightly regarded as being missing even if he later realized the position, since the thing is regarded as missing for the person who has lost its value. 1. Someone is regarded as "having something missing" if he has no action for its recovery against anyone.

15 ULPIAN, *Edict, book 10:* The goods of a community are wrongly called "public"; for only those things are public that belong to the Roman people.

16 GAIUS, *Provincial Edict, book 3:* We call someone who has contracted to collect a tax of the Roman people a *publicanus.* For the designation "public" relates in a number of cases to the Roman people; for communities are regarded as being in the position of private people.

17 ULPIAN, *Edict, book 10:* We do not regard as being "public" those things which are sacred or hallowed or designed for public use but those things which are, as it were, the property of communities. But the *peculia* of slaves of communities are regarded without doubt as public. 1. We must also regard as "public" those taxes from which the imperial treasury derives revenue, such as a harbor tax or a tax on saltworks, mines, and pitch factories.

18 PAUL, *Edict, book 9: "Munus"* is understood in three ways: first, as a gift, whence we talk of *munera* being given or sent; second, as a burden, and when this is remitted release from military service or a *munus* is as a result called immunity; third, as a duty, whence we talk of military *munera* and call some soldiers performers of the *munera;* and, therefore, we talk of *municipes* because they undertake civil *munera.*

19 ULPIAN, *Edict, book 11:* Labeo, in the first book of the *Urban Praetor's Edict,* lays down that some things "*agantur,*" some things "*gerantur,*" some things "*contrahantur*"; and indeed, *actum* is a general word whether something is done verbally or executed in fact, as in a stipulation or a computation. A *contractum,* however, is something which involves an obligation on both sides, which the Greeks call *synallagma,* such as purchase or sale, hire or partnership; *gestum* means something done not verbally.

20 ULPIAN, *Edict, book 12:* The words "*contraxerunt*" and "*gesserunt*" do not relate to the law of bearing witness.

21 PAUL, *Edict, book 11:* The emperor by granting *bona* is regarded also as granting the relevant obligations.

22 GAIUS, *Provincial Edict, book 4:* More is conveyed by restitution than by presentation; for "to present" is to provide the presence of something, "to restore" is also to make someone the owner and hand over the produce; furthermore, several things are embraced in the sense of restitution.

23 ULPIAN, *Edict, book 14:* Both cases and rights are contained in the designation "thing."

24 GAIUS, *Provincial Edict, book 6:* "Inheritance" is nothing other than succession to all the rights which the dead man possessed.

25 PAUL, *Edict, book 21:* We rightly describe a "whole" property as being ours even if the usufruct belongs to someone else because usufruct is not part of ownership but is a kind of servitude, like a right of way or passage; nor is it wrong for the "whole" of something to be described as mine of which no part can be described as belonging to someone else. Julian also held this view, and it is the more probable. 1. Quintus Mucius said that by the designation as a part something indivisible was meant; for something which is ours as a part is not a part but a whole. Servius elegantly held that by the designation as a part both were meant.

26 ULPIAN, *Edict, book 16:* Scaevola writes in the eleventh book of his *Questions* that offspring is not part of something stolen.

27 ULPIAN, *Edict, book 17:* "Land" is a place which is without a building. 1. "*Stipendium*" derives its meaning from *stips* because it is put together by means of *stipes,* that is modest sums of money. Pomponius says that "*tributum*" derives its meaning in the same way. And, indeed, *tributum* derives its name from what is contributed or from what is paid to soldiers.

28 PAUL, *Edict, book 21:* The expression "alienation" comprises also usucapion; for there

can scarcely be anyone who allows something to be taken in usucapion who does not seem to alienate. Also someone who has lost servitudes by not using them is said to alienate. Someone who does not use an opportunity of acquiring something is not regarded as alienating, as, for instance, someone who does not take up an inheritance or does not take up an option granted for a fixed time. 1. Discourse which has neither conjunction or disjunction is regarded as disjunct or conjunct according to the intention of the speaker.

29 PAUL, *Edict, book 66:* For Labeo says that conjunction is sometimes regarded as disjunction: as in the stipulation "you and your heir to me and my heir."

30 GAIUS, *Provincial Edict, book 7:* "Wood for timber" is as some people think a wood which is owned for this purpose, namely to be felled. Servius thinks that it is a wood which grows again from the stock or the root when it is cut. 1. "*Stipula illecta*" consists of ears of corn cut down during the harvest but not collected, which country people glean for when they have time. 2. "*Novalis*" is land which has been cleared and left empty for a year, which the Greeks call *neasin.* 3. "Intact," however, is land onto which the owner has not yet allowed flocks for pasturing. 4. "A fallen acorn" is one which has fallen from the tree. 5. "Wood for pasture" is wood which is intended for the pasturing of flocks.

31 ULPIAN, *Edict, book 18:* "A meadow" is something where one only needs a sickle to gather the harvest; it derives its name from the fact that it is prepared for harvesting.

32 PAUL, *Edict, book 24:* "Incompletely paid" is used even if nothing has been paid.

33 ULPIAN, *Edict, book 21:* "Openly" is in the presence of several people.

34 PAUL, *Edict, book 24:* In the expression "action" the notion of prosecution is comprised.

35 PAUL, *Edict, book 17:* Someone, however, is regarded as "restoring," who at the same time also gives a contestant that position which he would have had if the thing in question had been given to him at once at the moment when the suit was begun, including suits over usucapion and usufruct.

36 ULPIAN, *Edict, book 23:* The word "suit" covers every action whether *in rem* or *in personam.*

37 PAUL, *Edict, book 26:* The expression "ought" does not relate to the discretion of a judge who can give judgment for a greater or lesser amount, but refers to the truth.

38 ULPIAN, *Edict, book 25:* Labeo defines "*ostentum*" as everything done contrary to the nature or inborn characteristics of anything. However, there are two kinds: one, whenever something unnatural is born, as, for instance, with three hands or feet or with some other part of the body which is unnatural; second, if something appears fantastic, which the Greeks call *phantasmata.*

39 PAUL, *Edict, book 53:* "*Subsignatum*" means something which is signed by someone: for people used to use the word "*subsignatio*" instead of signature. 1. "*Bona*" are regarded as what remains to someone when debts have been deducted. 2. "*Detestari*" is to denounce someone in his absence. 3. "Uncertain possessor" is someone whom we do not know.

40 ULPIAN, *Edict, book 56:* "*Detestatio*" is a denunciation made with an oath. 1. The designation "slave" refers also to a female slave. 2. In the designation "family," children also are included. 3. A single slave is not covered by the designation "family," nor do even two make a family.

41 GAIUS, *Provincial Edict, book 21:* The designation "weapons" does not only include such things as shields, swords and helmets, but sticks and stones.

42 ULPIAN, *Edict, book 57: "Probrum"* is the same thing as *obprobrium.* It is sometimes something which is by nature shameful, and is sometimes so by convention and as it were by the custom of the community. So, for instance, theft or adultery is by nature shameful, but to be condemned to undertake tutelage is not by nature shameful but is so by custom of the community; for something which can happen to a respectable man is not by nature shameful.

43 ULPIAN, *Edict, book 58:* In the expression "*victus*" is comprised whatever is necessary for food, drink, care of the body and the support of human life. Labeo says that clothing also is regarded as part of *victus.*

44 GAIUS, *Provincial Edict, book 22:* And the other things which we use for protecting and looking after our bodies are covered by the same expression.

45 ULPIAN, *Edict, book 58:* Labeo says that by "*stratus*" every piece of clothing is meant which is put on; for there is no doubt that every cloak or *peristroma* is a piece of clothing which is a covering. So we regard as part of *victus* a piece of clothing which is not necessarily a covering, as part of *stratus* every piece of clothing which is a covering.

46 ULPIAN, *Edict, book 59:* "Pronounced" and "decreed" mean the same; for we regularly describe those who have the right of judicial decision indiscriminately as having pronounced or decreed. We ought to regard as "the wife of the head of the household" a woman who has not lived dishonorably; for her behavior separates and distinguishes a wife of a head of a household from other women. It will make no difference whether she is still married or a widow, freeborn or freed; for neither the state of being married nor birth make a wife of a head of a household but good behavior.

47 PAUL, *Edict, book 56:* The expression "release" has the same effect as payment.

48 GAIUS, *Praetor's Edict, book . . . :* We do not regard as "freed" someone who, although he has been released from his chains, is nonetheless physically restrained; and we do not regard as freed either someone who is under public guard but without chains.

49 ULPIAN, *Edict, book 59:* The designation "goods" can be either natural or prescribed by the civil law. The natural designation of goods derives from the fact that they beatify, that is, they make people happy; to beatify is to benefit. The designation of goods under the civil law consists of those things which form part of our patrimony. One must realize that among our goods must be reckoned not only those things in the case of which we have ownership but also any goods which are held by us in trust or which are superficiary. Among our goods will equally be reckoned also anything which is subject to actions, petitions, or claims; for all these things seem to form part of our goods.

50 ULPIAN, *Edict, book 61:* The designation "daughter-in-law" is to be extended to cover also the wife of a grandson and beyond.

51 GAIUS, *Provincial Edict, book 23:* In the designation "parent" is included not only a father, but also a grandfather and a great-grandfather and so on; likewise, a mother and a grandmother and a great-grandmother.

52 ULPIAN, *Edict, book 61:* In the designation "patron" is included also a female patron.

53 PAUL, *Edict, book 59:* Things have often been placed on the same footing so that something linked is regarded as something separate, and something separate as something linked, and occasionally something dissolved either as something linked or as something separate. For when older writers said, "*adgnatorum gentiliumque,*" they meant them as separate things. But if someone says, "*super pecunia tutelave suae rei,*"

a tutor cannot be granted separately without money; and when we say, "*quod dedi aut donavi,*" we mean both together. But when we say, "*quod eum dare facere oportet,*" it is sufficient to prove either of them. But when the praetor says, "*si donum munus operas redemerit,*" if all of these obligations have been imposed, it is certain that all of them must be fulfilled; and so the subject matter makes it clear that they are regarded as linked. 1. If some of them have been imposed, the rest will not be lacking. 2. There has likewise been uncertainty how those words "*ope consilio*" are to be taken, whether as linked or separate in meaning. But it is nearer the truth as Labeo says to take them as separate because a theft perpetrated with someone's help is different from theft perpetrated with someone's advice; this is why one can be sued by *condictio*, the other not. Of course, following the authority of older writers, the position has been reached that no one is regarded as having done something with someone's help unless that person also had an evil intention; nor is it a crime to have had an evil intention unless action followed.

54 ULPIAN, *Edict, book 62:* Conditional creditors include also those who do not yet have an action but who will have one, or those who possess the hope that they may have one.

55 PAUL, *Edict in Brief, book 16:* A creditor, however, is a person who cannot be set aside by a perpetual exception; someone, however, who has to fear a temporary exception is similar to a conditional creditor.

56 ULPIAN, *Edict, book 62:* "To take cognizance of documents" is to read them and master them; "to balance" is to relate receipts and expenses. 1. In the designation "children" are included not only those who are in power but also all those who are independent, whether they are male or female or descended from a son or daughter.

57 PAUL, *Edict, book 59:* If someone has a special care for something or if people have to display greater diligence and solicitude to others toward the things of which they are in charge, they are called "*magistri.*" Indeed magistracies themselves derive their name from *magistri*. So also teachers in any discipline are called *magistri* from the fact that they inform and explain. Someone who has received security is also held "*persequi.*"

58 GAIUS, *Provincial Edict, book 24:* Although there seems to be a certain subtle difference between "gesta" and "facta," nonetheless, there is improperly no difference between something which is done and something which is carried out. 1. We are rightly regarded as calling the freedmen of our fathers our own freedmen; we do not rightly call the freedmen of our sons our own freedmen.

59 ULPIAN, *Edict, book 68:* A "harbor" is the name of an enclosed space where goods are imported and whence they are exported; and any enclosed and walled-in place may equally have the same name. Whence one talks about *angiportum*.

60 ULPIAN, *Edict, book 69:* A "*locus*" is not an estate but some part of an estate; a "*fundus* [estate]," however, is something complete, and we mostly regard as a *locus* something without a villa; but both in our opinion and by *constitutio* a *locus* is distinct from a *fundus* in such a way that a *locus* can be called a *fundus* if we possess it with the intention of regarding it as a *fundus*. Indeed, it is not size which distinguishes a *locus* from a *fundus* but our intention. And any part of a *fundus* can be called a *fundus* if that is what we have decided. And, furthermore, a *fundus* can be decided to be a *locus* for if we have joined it to the *fundus* of someone else it will be made a *locus* on his *fundus*. 1. The designation of *locus* relates not only to country but also to urban properties according to Labeo. 2. But a *fundus* has its own boundaries, while a *locus* can extend more widely, depending on its determination and definition.

61 PAUL, *Edict, book 65:* In the designation of "*satisdatio*" will also sometimes be contained a repromission with which he to whom *satisdatio* was owed has expressed himself content.

62 GAIUS, *Provincial Edict, book 26:* In the designation of "*tignus*" in the *Law of the Twelve Tables*, every kind of material from which buildings are constructed is included.

63 ULPIAN, *Edict, book 71:* "In your power" has a fuller meaning than "with you." For whatever is held by you in any way is with you; something which is owned in some way is in your power.

64 PAUL, *Edict, book 67:* Not only someone who has not made a will is "intestate" but also someone whose inheritance has not been taken up under his will.

65 ULPIAN, *Edict, book 72:* The designation of "heir" relates not only to the first heir but also to successive heirs; for also the heir of the heir and so on is included in the designation of heir.

66 ULPIAN, *Edict, book 74:* The designation of "merchandise" relates only to movable things.

67 ULPIAN, *Edict, book 76:* Something is not properly described as "alienated" if it remains in the possession of the seller; but it is rightly described as "sold." 1. Speaking plainly, the word "donation" seems to regard every kind of donation whether it has been made in consideration of death or not.

68 ULPIAN, *Edict, book 77:* The words "*arbitratu Lucii Titii fieri*" relate to the law and do not apply in the case of a slave.

69 ULPIAN, *Edict, book 78:* The words "*cui rei dolus malus aberit afuerit*" in general comprehend any kind of deceit which has been perpetrated in an affair in which a stipulation has been interposed.

70 PAUL, *Edict, book 73:* One must realize that an heir can be acquired by many kinds of successions. For under a few headings, the designation of "heir" covers the next heir as in the substitution of someone who has not yet reached manhood with the words "whoever is my heir let him also be the heir to my son" where the heir of the heir is not covered because he is unknown. Likewise, in the *lex Aelia Sentia* the son as next heir can accuse a freedman of his father as undutiful but not if he is the heir of the heir. The same view is taken in demands for services so that son as heir can demand them, but not someone who is an heir as a result of succession. The words "he whom the matter concerns" are understood in such a way that anyone is covered who succeeds into complete ownership either under the civil law or under the praetorian law.

71 ULPIAN, *Edict, book 79:* "*Capere*" is one thing, "*accipere*" is something else. *Capere* is regarded as something which takes effect, *accipere* as something which occurs even if someone has not acquired something to hold it. And so someone is not regarded as obtaining (*capere*) something which he will have to give back; just as something is regarded as having arrived if it is to remain. 1. The words "*his rebus recte praestari*" mean that a stipulator should fear no danger or loss in the matter.

72 PAUL, *Edict, book 76:* In the designation of "thing" the part also is contained.

73 ULPIAN, *Edict, book 80:* The words "*eam rem recte restitui*" occurring in a stipulation include its produce; for the word "*recte*" relates to the judgment of a good man.

74 PAUL, *Curule Aediles' Edict, book 2:* A ring with a seal is not included in the designation of "ornament."

75 PAUL, *Edict, book 50:* Someone is regarded as "restoring" who has restored the thing which he would have had as *actor* if a controversy had not arisen over it.

76 PAUL, *Edict, book 51:* Someone is regarded as "having given" if he exchanged or gave in compensation.

77 PAUL, *Edict, book 49:* Julian writes that "produce" is used to cover not only the case of corn and vegetables but also vines, trees for felling, claypits, and quarries. It is not true that "produce" is everything on which man feeds; for meat and poultry and wild animals and fruit are not produce. However, Gallus was right to define "corn" as that which grows on the ear, but lupins and beans are rather regarded as produce because they do not grow on an ear but in a pod. Servius reported by Alfenus regards these as included under corn.

78 PAUL, *Plautius, book 3:* At times the word "possession" signifies property, as has been laid down in the case of someone who has bequeathed his possessions.

79 PAUL, *Plautius, book 6:* "Necessary expenses" are such that if they had not taken place, the object in question would either have perished or deteriorated. 1. Fulcinius says that "useful expenses" are those which make a dowry better not those which do not allow it to deteriorate, those, that is, as a result of which the woman acquires revenues, as, for instance, the preparation of the soil of a coppice beyond what was necessary or the education of her slaves. It is not right under this heading to impose on a woman who is ignorant or unwilling with the argument that she may lose the benefit of her estate or her slaves. Among these expenses we usually regard a bakery or a granary added to a block of flats which forms a dowry. 2. "Pleasurable expenses" are those which only improve the appearance of something, but do not also increase the income from it, as, for instance, gardens and fountains, wall decorations, pavements, pictures.

80 PAUL, *Plautius, book 9:* In the case of a general revocation of legacies, even liberty which has been granted is included according to the intention of the *Law of the Twelve Tables.*

81 PAUL, *Plautius, book 10:* When the praetor says, "*ut opus factum restituatur,*" a plaintiff must recover any loss involved; for every benefit of a plaintiff is included in the word "restitution."

82 PAUL, *Plautius, book 14:* The word "*amplius*" relates also to someone to whom nothing is owed, just as, on the other hand, something is regarded also as "incompletely" paid if nothing was exacted.

83 JAVOLENUS, *From Plautius, book 5:* Things cannot properly be called "goods" if they involve more disadvantages than benefits.

84 PAUL, *Vitellius, book 2:* In the designation of "son" we understand all children.

85 MARCELLUS, *Digest, book 1:* Neratius Priscus thinks that three make a "*collegium*" and this is rather to be followed.

86 CELSUS, *Digest, book 5:* What else are *jura praediorum* than the qualities of estates, such as fertility, salubriousness, size?

87 MARCELLUS, *Digest, book 12:* As Alfenus said, "*urbs*" means that part of "*Roma*" which was surrounded by the wall, "*Roma,*" however, also covers the neighboring built-up area; for one can see from daily usage that Rome is not regarded as extending only as far as the wall, since we say that we are going to Rome even if we live outside the *urbs.*

88 CELSUS, *Digest, book 18:* Someone leaves only just as much money as can be made up from his goods. Thus, we say that he has a hundred aurei if he has so much in es-

tates and other similar things. The same does not apply in the case of an estate belonging to someone else and forming part of his legacy, although it can be acquired by money forming part of the legacy. Nor does anyone regard a man who possesses coined money as possessing something which can be acquired with it.

89 POMPONIUS, *Sabinus, book 6:* Oxen are designated as being among *armenta* rather than among "*jumenta.*" 1. By the expression "as long as she is married" first marriages are meant. 2. There is a great deal of difference between "*edere*" and "*reddi rationes.*" Nor is someone who has been ordered *edere* obliged to give back what remains; for a banker also is regarded as rendering an account even if he does not pay what remains with him.

90 ULPIAN, *Sabinus, book 27:* He who hands over a house on the terms "*uti optimae maximaeque sunt*" does not say that it possesses any servitude but only that the house itself is unencumbered, that is, that it owes no servitude.

91 PAUL, *Fideicommissa, book 2:* Under the designation "*meorum*" and "*tuorum*" actions also must be regarded as being included.

92 PAUL, *Questions, book 7:* He whom no one precedes is regarded as "coming next;" he whom no one follows is regarded as "coming last."

93 CELSUS, *Digest, book 19:* In the designation "movable" we mean also "mobile," only, however, if it appears that the deceased described animals as moving because they moved themselves. This is right.

94 CELSUS, *Digest, book 20:* The word "restore," although it has the meaning of "give back," acquires also by itself the meaning of give.

95 MARCELLUS, *Digest, book 14:* The designation of "rest" can signify everyone.

96 CELSUS, *Digest, book 25:* The shore covers the area over which the highest tide of the sea reaches, and they say that Marcus Tullius first established this when he was arbitrator. 1. We do not regard estates as belonging to people if they hold them in common, but where each person holds his own.

97 CELSUS, *Digest, book 32:* When we stipulate, "*quanta pecunia ex hereditate Titii ad te pervenerit,*" we are regarded as considering the things themselves and not their prices.

98 CELSUS, *Digest, book 39:* When it is an intercalary day, it does not make any difference whether someone was born on the first or second day, but thereafter his birthday will be the sixth day before the kalends. For those two days are regarded as one day. But it is the later day which is intercalated, not the earlier; so if someone was born on the sixth day before the kalends in a year in which no intercalation took place, when the sixth day before the kalends is intercalated, he has the earlier day as his birthday. 1. Cato thinks that an intercalary month is an additional one, and Quintus Mucius regards all its days as a moment of time and attributes them to the last day of the month of February. 2. But an intercalary month consists of twenty-eight days.

99 ULPIAN, *Duties of Consul, book 1:* We can regard "*notio*" as covering cognition and jurisdiction. 1. We must regard "neighboring provinces" as those which adjoin Italy, as, for instance, Gaul; but we must regard the province of Sicily as rather being among the neighboring ones since it is divided from Italy by a narrow strait. 2. It will be very difficult to distinguish the things which are included in the designation "*instru-*

menta"; [let us consider] those things which are properly *instrumenta* on account of which adjournment is granted, and then let us distinguish. 3. If adjournment is sought with a view to the presence of the person who can instruct, for instance, someone who has carried something out even in slavery or someone who has been established as an *actor*, I should think that the adjournment is sought on the grounds of *instrumenta.*

100 ULPIAN, *Duties of Consul, book 2:* We must regard as "respectable people" those people of both sexes who are *clarissimi*, likewise, those who enjoy senatorial privileges.

101 MODESTINUS, *Distinctions, book 9:* Some people think that there is this difference between "debauchment" and "adultery," that adultery is committed against a married woman, debauchment against a widow, but the *lex Julia* on adultery uses this word indifferently. 1. "Divorce" is regarded as taking place between husband and wife; "repudiation," however, seems to be of a betrothed. This term also is not unreasonably used in the case of a wife. 2. It is right that "disease" is a temporary weakness of the body, "defect," however, a permanent flaw in the body, as, for instance, if someone has broken his ankle; for someone one-eyed is also defective. 3. Some people think that when slaves are bequeathed, female slaves ought to be included since a single name covers both sexes.

102 MODESTINUS, *Rules, book 7:* A law may suffer "derogation" or "abrogation." Derogation affects a law when part is removed, abrogation when it is entirely abolished.

103 MODESTINUS, *Rules, book 8:* Although for those who speak Latin "capital" covers every case where a man's reputation is at stake, nonetheless, the designation capital is to be regarded as covering death or loss of citizenship.

104 MODESTINUS, *Releases, book 2:* The designation of "children" extends also to descendants.

105 MODESTINUS, *Replies, book 11:* Modestinus replied that the freedman of the freedwoman of a testator is not included in the words "to my male and female freedmen."

106 MODESTINUS, *Prescriptions, sole book:* "*Dimissoriae litterae*" are those which are commonly called *apostoli*. They are called *dimissoriae* because the case is dismissed for the person who was cited.

107 MODESTINUS, *Encyclopaedia, book 3:* "To assign a freedman" is to testify to which son a man wished that freedman to belong.

108 MODESTINUS, *Encyclopaedia, book 4:* "Debtor" is understood to mean someone from whom money can be exacted against his will.

109 MODESTINUS, *Encyclopaedia, book 5:* "A purchaser in good faith" seems to be someone who did not know that the thing belonged to someone else or thought that the seller had the right to sell, for instance, a procurator or tutor.

110 MODESTINUS, *Encyclopaedia, book 6:* A "*sequester*" describes someone with whom several people deposited the thing which is the subject of controversy; he is so called from the fact that the thing is committed to someone who meets or, as it were, follows (*sequor*) those who are at odds.

111 JAVOLENUS, *From Cassius, book 6:* "*Censere*" is to establish and ordain, whence also we are used to saying "*censeo* (I ordain) that you do this" and "to have established something for oneself." The name of censor seems to be drawn from this usage.

112 JAVOLENUS, *From Cassius, book 11:* The public shore extends as far as the waves reach at their furthest point; and the same legal position exists in respect of a lake, unless it is wholly private.

113 JAVOLENUS, *From Cassius, book 14:* "A disabling disease" is one which damages something.

114 JAVOLENUS, *From Cassius, book 15:* No one is regarded as solvent unless he can pay everything.

115 JAVOLENUS, *Letters, book 4:* The question arises, what distinguishes a *fundus* from a possession or a field or an estate. A "*fundus*" is anything which consists of land. A "field" exists if a kind of *fundus* is prepared for human use. A "possession" differs from a field by reason of law; for whatever we take, if its ownership does not pertain or cannot pertain to us, we call it a possession. So possession is use, a field the ownership of a place. An "estate" is the general name of either of the aforementioned things; for both field and possession are types of this kind of designation.

116 JAVOLENUS, *Letters, book 7:* In "whatever other son or son of a son be my heir," Labeo thinks a daughter is not covered, Proculus the opposite. Labeo seems to me to be paying attention to the literal meaning of the words, Proculus to the intention of the testator. His reply is: "I do not doubt that Labeo's opinion is wrong."

117 JAVOLENUS, *Letters, book 9:* A man against whom an action for a larger sum does not lie can not be regarded as "paying in part."

118 POMPONIUS, *Quintus Mucius, book 2:* "Enemies" are those who have publicly declared war on us or on whom we have publicly declared war; others are "brigands" or "pirates."

119 POMPONIUS, *Quintus Mucius, book 3:* The designation "inheritance" certainly includes also an inheritance which is a liability; for it is a legal category like *bonorum possessio*.

120 POMPONIUS, *Quintus Mucius, book 5:* In these words of the *Law of the Twelve Tables*, "*uti legassit suae rei, ita jus esto*," the widest possible power seems to be conferred of naming an heir and granting legacies and establishing tutelages; but this has been narrowed by interpretation or the authority of laws or those who establish law.

121 POMPONIUS, *Quintus Mucius, book 6:* The interest which we receive on money is not in the category of produce, because it does not arise by a process of reproduction, but for a different reason, that is, a new obligation.

122 POMPONIUS, *Quintus Mucius, book 8:* Servius says that if one writes, "I assign these tutors to my son or sons," the tutors are assigned only to male issue, since one seems to have moved from the singular case "*filio*" to the related plural of the same gender as the earlier singular had. But this is a question of fact, not of law; for it can happen that someone used the singular case of a son and then wished in assigning a tutor to have provided more fully for all one's children. This seems to be more reasonable.

123 POMPONIUS, *Quintus Mucius, book 26:* The words "will be" sometimes indicate the past and not only the future. Thus, it is necessary for us to know, especially when codicils have been confirmed in a will in these words "whatever shall be written in any codicils," whether the authentication relates to the future or also to the past, if anyone leaves codicils written earlier. This is to be interpreted according to the will of the author. But just as the word "is" refers not only to the present but also to the past, so the words "will be" refer not only to the future but also sometimes to the past. For when we say, "Lucius Titius is released from his obligations," we refer to both the present and the past, so also with "Lucius Titius is bound"; and the same is true if we